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LEADING ARTICLES

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VOL. XII MARCH, 1940 No. 3

THE STATE ALSO IS ENTITLED TO A FAIR TRIAL

Some Instructions Which Align the Court with Defense Counsel

*Julian P. Alexander**

"No precedents can sanction injustice; if they could, every human right would long ago have been extinct upon the earth."—Lord Erskine.

Section 586 of our Code[1] forbids trial courts to comment on the testimony or charge the jury as to the weight of the evidence.

The very tendencies which it was enacted to forbid, have persisted to defy it.[2] Now and then a judicial voice cries out in the increasing wilderness, but there is no enduring repentance.[3] It is common to define injustice in relation to the defendant; yet the state itself can be the victim of injustice.

*Circuit Judge, Seventh Judicial District; Former U. S. Attorney, So. District Mississippi; member Mississippi and Hinds County Bars, Jackson, Mississippi.

[1]"The judge in any cause, civil or criminal, shall not sum up or comment on or charge the jury as to the weight of evidence; but at the request of either party he shall instruct the jury upon the principles of law applicable to the case. . . ." Miss Code Ann. (1930) § 586.

[2]4 Wigmore, Evidence (2d ed. 1923) § 2056; Farley, *Instructions to Juries—Their Role in the Judicial Process* (1933) 5 Miss. L. J. 203.

[3]"The judge for admissibility, the jury for weight,—such is the orthodox and unflinching rule of the inherited common law. But the judges, in instances too numerous not to be alarming, are now giving instructions of law upon the effect of particular pieces of Evidence. These instructions [pounced upon, of course, by the claws of an exception] are gravely quibbled over in supreme courts; and these quibblings are recorded to form a new reticulation of rules." 5 Wigmore, Evidence (1st ed. Supp. 1908) Preface, p. vi.

"We have never perceived upon what principle the trial courts have acted in singling out particular portions of the evidence in a cause, and telling the jury that it ought or might consider this, that or another evidence in reaching a verdict. By admitting the evidence it has declared its competency and the jury should be left to its function or determining the weight and effect to be given it." Thompson v. State, 73 Miss. 584, 19 So. 204 (1895). "It is a dangerous practice to engraft innovations upon the statute." Calloway v. State, 155 Miss. 706, 125 So. 109 (1929).

So great is the solicitude for the defendant's rights that it may seem heresy to suggest the possibility that under our present system the defendant gets not only his full day in court but perchance receives undue process of law, and an unequal protection of the laws. Indeed, lest we seem unappreciative of the defendant's constitutional rights, we see to it that "the accused shall have a right not only to be heard by himself or counsel, or both"; but through liberal instructions, by the court also.

As a prelude to the discussion of the state's increasing burden, there are presented concisely a few familiar examples of rights deemed peculiar to the defense. Continually to err on the side of the defendant invokes a high-sounding phrase, but when seen from its reverse it indicates habitual errors against the state.

Against this variegated background pattern a criticism of some familiar defense favorites may appear less presumptuous.

By statute[4] the prosecution may not comment even indirectly upon failure of the defendant to testify. Nor is any presumption allowed against him for thus withholding the truth.[5] Yet the failure to put witnesses on the stand in a civil case may not only be commented upon, but instructions may be given authorizing the jury to presume that such testimony if adduced would be adverse.[6] Moreover, the appellate court can consider the defendant's failure to deny the state's evidence in adjudging whether the original error (in respect to improper comment) was reversible.[7] The defendant can get an instruction that his failure to testify cannot be used against him.[8] Wherefore, the state may not comment thereon, but the defendant may do so.

Under certain circumstances the jury is compelled to accept the defendant's testimony;[9] yet there are some witnesses who, in spite of actual knowledge of the crime, may not be used by the

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[4]MISS. CODE ANN. (1930) § 1530.

[5]Reeves v. State, 159 Miss. 498, 132 So. 332 (1931). "The law casts no suspicion upon the defendant's testimony." Jennings v. State, 118 Miss. 619, 79 So. 814 (1918).

[6]Masonite Corp. v. Hill, 170 Miss. 158, 154 So. 295 (1934); Beard v. Williams, 172 Miss. 880, 161 So. 750 (1935); Robinson v. Haydel, 177 Miss. 233, 171 So. 7 (1936); 10 R. C. L. 887, § 36.

[7]Wexler v. State, 167 Miss. 464, 142 So. 501 (1932); Hanna v. State, 168 Miss. 352, 151 So. 370 (1933).

[8]Haynes v. State, 27 So. 601 (Miss. 1900).

[9]Weathersby v. State, 165 Miss. 207, 147 So. 481 (1933); Busby v. State, 177 Miss. 68, 170 So. 140 (1936).

state;[10] or their testimony, if used, may be discredited by the court.[11] The testimony of an accomplice is to be "received with care and caution"; yet no court would hint that the testimony of the accomplice's accomplice (the defendant) should be so discounted.

Of course there is the presumption of innocence and the requirement of proof of guilt beyond all reasonable doubt. The defendant may not be convicted on probabilities; but he may be acquitted by them. Courts will, if necessary for the protection of the defendant, presume the death of a third person in order to presume the innocence of the defendant.[12] The jury may be cautioned against witnesses or testimony for the state, but not against those which the defendant introduces.

The defendant can compel the state to disclose its proof in advance;[13] the state may not so require the defendant.[14] No matter how incriminating the evidence may be, the defendant can have it suppressed if it was procured under a search warrant with technical defects. The state must convict with the unanimous agreement of twelve men; the accused can defeat conviction through the disagreement of one. If there is error, the conviction can be reversed; but an acquittal must stand. Even when the state has disclosed by its evidence a clear case of guilt, the accused may have the court charge the jury that he is still presumed to be innocent.[15]

In a murder trial the state must show malice. If it does not show enough the trial results in manslaughter, or an acquittal. If it shows too much, it is likely to fall within the zone of "heat of passion", resulting again in manslaughter or acquittal.

All admonitions of the court to care and caution are directed toward the state's testimony or witnesses. No testimony favorable to the accused is charged to be received with care and caution. If the defendant denies guilt, his testimony must be weighed as that of any other witness and, under certain circumstances, must be believed. Yet, if he has admitted his guilt such admission must be received under suspicion.

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[10]Wife of accused, MISS. CODE ANN. (1930) § 1528.

[11]For example, that of an accomplice. For discussion of this topic, see note 83 *infra* and accompanying text.

[12]White v. State, 178 Miss. 650, 174 So. 562 (1937).

[13]Eaton v. State, 163 Miss. 130, 140 So. 729 (1930); Keeton v. State, 175 Miss. 631, 167 So. 68 (1936).

[14]Watts v. Smith, 24 Miss. 77 (1852); Malouf v. Gully, 192 So. 2 (Miss. 1939); See Danziger v. State, 238 Mich. 39, 213 N. W. 448, 52 A. L. R. 136, 143 (1927).

[15]See discussion of the Presumption of Innocence, at p. 276 *infra.*

As hereinafter shown,[16] full benefit of the suggestions embodied in cautionary and advisory instructions is sought by impressing the jury with the idea that the court not only allowed or approved these instructions, but that they were given *sua sponte* by the court. Under our system the court is almost estopped to gainsay this.

The court may direct a verdict of acquittal, but not one of conviction. The court may suggest to the jury that certain witnesses or testimony may be looked at askance; but it may not remind them of the obvious truth that an alibi may be easily fabricated.[17] The court may hint that a juror in sympathy with defendant's case may hang the jury; but not that a jury adverse to accused may do so.[18]

The state must dissipate all reasonable doubt by positive evidence; the accused can create reasonable doubt either by evidence or by the lack of same.[19]

Such are a few gleanings from instructions which have been given to the defendant, and which give new meaning to the phrase "burden of proof".

Thus fortified against any charge of crusading against the established order, it is proposed to isolate a few outstanding defense instructions for examination. They being summoned invariably to insure for the defendants a fair trial, it may be interesting in turn to compel them to stand trial on their on merits.

The Sinker Instruction[20]

The duty and purpose of the state, an indictment having been brought, is to try to convict the defendant.[21] To this end, the prosecutor should and does in fact presume that the defendant is guilty.

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[16]See note 52 *infra*.

[17]Dawson v. State, 62 Miss. 241 (1884). Yet in Nelms v. State, 58 Miss. 362 (1880) the refusal was not based on lack of intrinsic merit, which was impliedly conceded.

[18]See under topic "The Sinker Instruction" *infra*. Also Gee v. State, 183 Miss. 697, 185 So. 203 (1938).

[19]Howell v. State, 98 Miss. 439, 53 So. 954 (1911); Benson v. State, 102 Miss. 16, 58 So. 833 (1912).

[20]". . . that the defendant is entitled to a verdict of twelve jurors, and if after a free conference with your fellow jurors there is a single member of the panel who entertains a reasonable doubt as to the defendant's guilt, it is the solemn duty of such juror never to yield his opinion but forever to stand by his convictions and favorable to the acquittal of the defendant, and always to vote such conviction, regardless of the views of the other jurors, and never to surrender such opinion merely because all the other members of the jury disagree with him, or in order to shorten the labors of the panel or to save the time of the court."

[21]This is of course consistent with the theory that the state is sincere in its belief that the defendant is by it justly accused. How an assumption of

The defendant, on the other hand, usually has two alternative objectives—the first, acquittal, the second, mistrial. His slogan—"anything but conviction"—naturally leads to a request for instructions admonishing the jurors individually and collectively to be morally certain of any verdict of guilt, and to withstand any influences not originating in their own convictions. To this end, pride in their own opinions is encouraged by instructions that such pride may best be exhibited by withstanding any assaults of reason and logic emanating from fellow jurors.

It was subtle yet plausible to build such admonition upon the cautionary and wholly acceptable reminder that in a criminal case the verdict must be unanimous. This developed from an instruction to the jury as a whole into one directed to the individual juror. It assumed the aspect of a personal appeal to any juror who qualified himself as a target of such suggestion. Each juror was thereby caused to feel not only his personal responsibility, but also his individual power, which in these circumstances was the power to "hang" the jury rather than the defendant.

The necessity for complete accord was enlarged into a suggestion for discord. The modern version was undoubtedly builded upon the assumed formula that in the human equation the ratio of reason to pig-headedness is eleven to one. Also that pride of opinion was part of the defense mechanism of the average juror. It further assumed that inferiority complexes eagerly sought occasion for compensation in a scene wherein the judgment of a single member could counterbalance that of eleven others and thus hold the scales of decision at the dead level of non-action or mistrial.

The state seeks the agreement of twelve; the defendant the disagreement of one. Hence the emphasis upon and the appeal to the possible "sinker", as he is in some quarters affectionately called.

The "sinker's" pride of opinion often manifests and measures itself in grandiloquent phrases and analogies, which by their disrespect of reason and experience are significantly apt. For example, the vehemence of his protestation of loyalty, either to his prejudgment or to his first impressions, finds its most frequent expression

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guilt can be consistent with a legal presumption of innocence, see text at p. 278 *infra* and note 44 *infra*. Since all the defendant need hope for to avoid conviction is one loyal recalcitrant, such discussions, as well as the facts, usually deal with the 1 to 11 situations.

in a familiar and forceful figure of thought fixation. In substance, it promises—or threatens—to maintain mental immobility until such time as antarctic frosts beset the hinterlands of Hades.

This rather remote contingency is unscientific, purposely indefinite, and is supported by neither reason nor scripture. It merely supplies an apt, albeit unoriginal, symbol of a benumbed resolution so congealed in the acid bath of bias as to withstand the defrosting warmth of reason and counsel. Rather than overtax his mental processes by the positive effort of changing his mind, he settles down into profound mental lethargy, his awakening timed to the horn of Gabriel. With characteristic economy of effort by a single vote he acquits the defendant of crime and convicts the perverse eleven of stupidity.

Egotism is nurtured by the sense of achievement of a dormant mental state wherein a mortified mind, embalmed in the lethal juices of prejudice, becomes unresponsive to transfusions of duty, right, or justice. Accepted as a juror because he had no fixed opinion, he is now unacceptable because it is too fixed. The ill-concealed insinuation of his fellows that he himself was fixed prior to his opinion, is insulated from his finer feelings by ears long closed to either abuse or reason. Not having come of his own free will and accord, he now divorces these congenial motives by eschewing accord and espousing free will.

The embattled eleven at the outset devote the first few hours to a concerted effort to blast this rock-ribbed obstinacy with the fires of their enthusiasm. As an alternative technique they seek in vain to thaw the congealed mental processes with heated debate. Finally, rolling back the sleeves of tact and diplomacy and removing the impeding outer garments of patience and persuasion, they openly assault the door of his sensibilities by assigning him to a certain definite and altogether vile niche in the Hall of Infamy. He is not only classified with the seven deadly sins but catalogued as the deadliest of the seven deadly sinners. He is permanently filed away in the pigeonholes of perfidy.

Grudgingly indulging the assumption *pro hac vice* that he has a soul, they forthwith consign it to hell, if there be any, otherwise to oblivion. They compare him unfavorably with the moron and the ass. Gratuitously they advise him that he has attained a new high in imbecility, and that such perfection therein is explicable only upon the theory of a dissolute ancestry.

Seated in self-imposed exile in the corner of his choice, he is the picture not of one engrossed in thought, but of one enmeshed in it. He is not merely fixed in his opinion; he is transfixed by it. With chin upon knuckles and with eyes and opinion fixed, he affects the role of The Thinker. But the eleven, scorning this crude and inept charade, see him only as The Sinker. To them he is all body and no mind, and in their graphic idiom he is seen merely as a man "sticking out his neck". Routed in their attempt to exchange their views for his, they substitute a yearning to replace his knuckles with theirs. He is unmoved.

Some seek to barter truth with him in exchange for his opinion. He is not interested. Truth to him is too abstract a conception. Knowing that merely to speak to him of his perversity as adamant, is but too "damn it with faint praise", the eleven go further and condemn it with diatribe that is neither praise nor faint.

Vacancy stares out the window into vacancy. He is strengthened by a vision of that big moment in a day to come when, given audience by uncouth amateurs in the art of obstinacy, and by lewd fellows of the baser sort, he may give assurance that when he sinks them they stay sunk.

But the size of our canvas is limited and we may not complete the portrait.

In our state some form of this instruction is asked for in nearly every felony case.[22] Solemnly proclaimed to the judge as a necessary protection of constitutional rights, it is nevertheless lampooned in the corridors as "The Sinker Instruction". At the kernel of this gibe is a purpose that is not even subtle and is apt to be insidious. The use of silver to tempt disagreement being unthinkable, effective phrases may with impunity be coined and made current to influence little minds.

The giving of this and other instructions herein discussed, while habitually justified solely by the precedent of other trial judges, is seldom reviewed by our apellate court since the state does not appeal. Only in rare cases where they are refused are they examined on appeal.

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[22]In most of the recent *causes celebres* (citations of which are irrelevant here) all the instructions herein examined were asked and given. It may, here as well as elsewhere, be suggested that it is only in those rare cases were such instructions are denied by the trial court and an appeal held "properly refused" that our appellate court takes occasion to pass upon them.

In *Lawson v. State*[23] the instruction was declared "a mere truism" and its refusal held proper. In the case of *Ammons v. State*[24] the refusal of substantially the usual form was held reversible error. Yet the instruction did not overemphasize the holding out of jurors in disagreement.

In *Bell v. State*[25] the instruction was held bad and its refusal not error. Its defect was held to be that it failed to stress the importance of a full and free consultation with fellow jurors.[26]

In *Thomas v. State*[27] the instruction was held to have been rightfully refused. The intimation that the palpable guilt of the defendant dispensed with the necessity for carefully appraising the instruction bore fruit nineteen years later in *Speaks v. State*,[28] wherein it was held that in a close case it is error to refuse the instruction. Passing over any comment upon the instability of a basis which accomodates itself to the varying strength of the defense, we come to the most interesting feature of this latter case. The opinion therein was rested upon the *Lawson, Ammons, Bell* and *Thomas* cases, in all of which, except the *Ammons* case, the refusal of the instruction had been upheld. Significantly the decision in the *Speaks* case overlooked or ignored the fact that one year after the decision in the *Thomas* case both the *Bell* and *Ammons* cases were overruled.[29] In the *Speaks* case the court was undoubtedly influenced again by its finding that it was a case of "serious conflict".

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[23]Lawson v. State, 87 Miss. 562, 40 So. 325 (1905). Here the instruction charged that each juror should base his verdict on the law and the evidence of the case and not consent to a verdict merely because it was the verdict of some or even a majority of the jurors. This was in the least objectionable form, and represented a true statement of the duty of the jurors. Its refusal could be justified by such considerations as, the jurors were already sworn to the same effect, or that it stated a plain duty, or that qualified jurors need no such admonition.

[24]89 Miss. 369, 42 So. 165 (1906).

[25]89 Miss. 810, 42 So. 542 (1906).

[26]It is not believed the ends of justice are served nor the instruction made an instrument of enlightment and aid, when the stress is laid upon that which tends to disagreement to the making incidental important jury functions—consultation and exchange of ideas. It would be more logical to instruct the jury that, if they disagree, they should resort to free consultation rather than that after a formal consultation, they should guard their independent opinion "even as the Parsee guards the sacred flame".

[27]103 Miss. 800, 60 So. 781 (1912).

[28]161 Miss. 334, 136 So. 921 (1931).

[29]Walford v. State, 106 Miss. 19, 63 So. 316 (1913). Here the appellate court's confidence in its position (shown by affirmance of a death sentence where the instruction had been refused) was attested by its declaration that "it is hardly possible that any of the jurors selected were not men of sufficient intelligence to know that he must not return a verdict of guilty simply because the other jurors favored doing so".

Any suggestion tending to emphasize or encourage stubbornness, such as that the hoped-for recalcitrant should "never change his verdict", or "never yield", or should "hold out forever",[30] or the like, provocative of eternal perversity or loyalty, should be decisively eliminated or the state allowed neutralizing charges. The best solution is to discredit it altogether except as to stating the necessity for unanimity.

If it is a mere truism or the statement of an accepted generality, there is no reason why the state should not be equally entitled to ask it.[31] Even the harmless abstraction, "the defendant is entitled" to a verdict of twelve jurors, would be equally as true if "the state" were substituted.[32] The best evidence that it is a poor rule is that it does not seem to work both ways.[33]

Insistence of defense counsel upon this instruction in its "most objectionable form" would lead all, save those with a childlike faith in universal mental and moral integrity, to suspect that somewhere in the duly sworn and empanelled woodpile of defendant's peers, theretofore hopefully stacked, there lurked, duly camouflaged as a bump on one of the logs, the inevitable "nigger".

That solicitude for exact justice, made so readily available to the accused, should be made applicable to the state by avoiding the lending of encouragement to such hopes.

The state also is entitled to a fair trial.

Other cases[34] merely illustrate the uncertainty attending a consideration of this procedural ace up the defendant's sleeve. As already intimated, the most pertinent and significant condemna-

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[30]In Blevins v. State, 169 Miss. 868, 154 So. 269 (1934) the trial court properly eliminated the phrase "on each and every ballot", and added "after full and free consultation". Except as a step in the right direction, the case is not otherwise helpful.

[31]Doubt as to this was intimated in Gee v. State, 183 Miss. 697, 185 So. 203 (1938). It is believed, however, that if and when the contention is directly presented, the inconsistency will be recognized.

[32]Comparison is invited to instructions given both parties in civil cases on the "nine juror verdict". It is doubted whether any one party is ever exclusively entitled to an instruction on abstract legal propositions.

[33]Yet both the state and the defendant are entitled to poll the jury to test its unanimity. Archer v. State, 140 Miss. 597, 105 So. 747 (1925). When directly confronted with the demand for recognition of the right of both parties to abstract instructions our court has conceded the justice and reason thereof. See Prine v. State, 73 Miss. 838, 19 So. 711 (1896).

[34]Cartee v. State, 162 Miss. 263, 139 So. 618 (1932), wherein the trial court's action in refusing to give the instruction was affirmed; Millette v. State, 167 Miss. 172, 148 So. 788 (1933), wherein the refusal to give the instruction was held error. The latter case "followed" Speaks v. State, 161 Miss. 334, 136 So. 921 (1931).

tion comes from those who, publicly insisting upon this loophole as a "sacred right", refer to it in private with mingled delight and derision as "The Sinker Instruction".

The Living Witness[35]

The presumption of innocence is of such dignity and of such importance to the defendant that it has often been overindulged by the courts. Unrestrained in its assertion of power, it has been allowed to run at large clothed in any finery and indulged in all its self-assertions.

The most daring of the roles it has been vouchsafed is that of a "living witness". Thus characterized, it is allowed to wander from among its fellow precepts about the bench, and given the privileges of the floor, "testifying" at the bar for the defendant. Unsated, it vaults the jury rail and romps about among the sworn jurors. Climaxing its ludicrous career, it whispers into the ear of arguing counsel, and in the end files out with the jury.

In the gridiron of conflicting debate it assumes a modern and popular role, running interference for the defendant, ever alert to recover any fumbles of that pigskin of due process which the constitution has passed into the waiting arms of the accused.

Here it sets the jurors upon their ears with its "demand" for acquittal of the defendant *non obstante* actual guilt. Under sanction of the court it stands before them a thing of flesh and blood—"a living witness". Nay more, it stays with them in their guarded and sacrosanct chambers, flailing its arms like a losing coach between the halves. Ever "demanding acquittal" of its protege, it declares his purity and innocence, heckling the jurors no end,

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[35]". . . that the defendant is presumed to be completely and wholly innocent of the crime charged in the indictment. . . . This presumtion of innocence is established by the law of the land, and is no mere idle form or ceremony but a substantial legal right guaranteed to the defendant, requiring each and every juror on this panel that he should at the outset of this trial absolutely believe the defendant to be innocent of every material element of the charge and every evil intent and guilty mind necessary to constitute the same. This presumption stands as a living witness for the defendant requiring and demanding a verdict of acquittal. It testifies for him throughout the trial, it attends you when you retire to your jury room, and there and everywhere throughout the trial it declares to you his innocence, and the court now tells you to listen to this witness. This presumption is no mere fiction but is evidence in favor of the defendant, and it accompanies the defendant as a sword and shield against an unjust conviction, and throughout every step and stage of the trial it itself says to find the defendant not guilty unless it has been broken down and shattered by competent and credible evidence beyond every reasonable doubt and to a moral certainty." (A recently used form).

stirring up confusion, dissension and reasonable doubt. Moreover, this presumption is licensed by the court to stride boldly "throughout the whole case", from the calling of the first juror to the final vote of the last. It "attends the defendant throughout the trial". Nor can it be ejected by reason, argument or deputy sheriff until it is all over. Then it files out and resumes its place as bystander ready to join in the advocacy of the next case. It is not partial to the cause of any particular defendant. To it they are all innocent.[36]

Proudly it insists that it is no "idle ceremony". This is a modest understatement. For, whatever it may be, it is not idle. Although The Sinker, though immobile, is perpetual, the Presumption of Innocence, though temporary, is motion. In its versatility it assumes other roles. Upon occasion it becomes a "sword" or "shield", or both. In activity, Horatius at his bridge was in comparison merely a passive "sinker". It is now defensive, now offensive; now an advocate, now a gladiator. Like the Spartan warrior the defendant is adjured to return with this shield or upon it.[37] Nor does it scruple to don the robes of a "guardian angel" if by so doing it might impress the jury.[38]

If there be any who are minded to view this homely characterization as tainted with irreverence or jocosity, he need only reflect that it is painted solely with pigments furnished by the instruction itself. If there be any who suspect that it is overdrawn, he has never heard a well-paid advocate for the defense, oozing an emulsion of tears, perspiration and sanctity as he divides an ample eulogy between his client and his Fidus Achates—The Presumption of Innocence.

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[36]Persisting in the homely figure, the door to the jury room should be firmly shut in its face if, when the tumult of the witnesses and the shouting of counsel dies, the jurors all are convinced of the defendant's guilt beyond reasonable doubt.

The most it should be permitted to demand is that whenever any juror weakens, it be allowed to re-enter and inject as much doubt as his reason can absorb.

[37]To retain the figure, the convicted defendant is borne forth upon the reverse side of this "shield" which appropriately bears the device "presumption of guilt". *Cf.* Dean v. State, 173 Miss. 253, 162 So. 155 (1935); Caldwell v. State, 104 Tenn. 321, 48 S. W. (2d) 1089 (1932).

[38]These excesses probably received their first impulse from BRADNER, EVIDENCE § 460. Prof. Thayer ascribes its most extravagant form to legends about Rufus Choate. THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) p. 553. Here reference is made to the additional role of "guardian angel" which was added to its repertory by Bradner *supra*.

The Presumption of Innocence

First of all it is not a presumption in the strict sense. It is not an inference deduced from a given premise.[39] It is an *assumption* which pays deference to moral conduct and ideals and whose original purpose and effect is to fix the *burden of proof* upon whoever asserts any deviation from this socially desirable ideal. True, this burden never shifts and remains upon the state "throughout the trial", and it is true that the presumption of innocence so fixes this burden. The necessity of belief of guilt beyond reasonable doubt, as a fixed principle, "stays throughout". It indeed is a legal fixture. This principle affects the degree of proof; but the proof cannot affect it. The presumption of innocence is directly affected by the proof.

When this presumption has placed the burden where it belongs, it may well retire, except concededly for an occasional appearance to see that the burden stays put. Why should the law compel the jurors to admit it to their councils when its voice can no longer be heard above the din of facts crying aloud defendant's guilt? The presumption should survive only so long as there is reasonable doubt of guilt. If the first witness for the state raises conviction of guilt above the degree of reasonable doubt there is no reason why the presumption should be allowed longer to "stand before them" and "demand acquittal".

If there was not at the close of the state's case evidence sufficient to justify a verdict of guilty, thereby making the presumption only a fiction, the court should direct a verdict for the defendant. If the presumption stayed around throughout the trial no defendant could ever be convicted, howsoever guilty he might be. It ought to yield as to each respective juror as soon as and as long as such juror is convinced of guilt beyond all reasonable doubt.[40]

It can be said with deference that this so-called presumption is contrary to experience. It is not based upon logic, experience, or statistics. It comes not through reasoning. It should serve its com-

[39]Among many discussions vindicating the soundness of this view, 5 WIGMORE, EVIDENCE § 2511, is typical. So UNDERHILL, CRIMINAL EVIDENCE (2d ed. 1910) p. 32.

[40]"The presumption of innocence fixes the burden of proof in the first instance. It remains with the defendant only until overcome and does not necessarily remain with him throughout the whole of the trial". Culpepper v. State, 4 Okla. Cr. 103, 111 Pac. 679, 31 L. R. A. (N. S.) 1166 (1900). This view is more plausible to ordinary minds than our holding that this presumption does not even yield to facts. Howell v. State, 98 Miss. 439, 53 So. 954 (1911).

plete purpose and fully justify its existence by placing at the outset the burden of proof (non-persuasion) upon the prosecution.[41] If the entire jury agree upon and report a verdict of guilty, the defendant is thereafter actually presumed to be guilty. The latter is a true presumption, being a conclusive legal inference from the fact of the verdict. Certainly as to each respective juror the presumption of innocence should yield immediately and as a necessary requirement of logic and common sense, to a belief of guilt beyond reasonable doubt.

The presumption is not evidence.[42] It is not a "witness". It cannot "testify" for the defendant. If the courts are bothered as to how long the presumption of innocence persists, they should not tell the jury; they should ask them. It is conceivable that such assumption of innocence would not outlast the initial scrutiny of the defendant by a jury gifted in character reading, or with normal intuition. This consideration is indeed the chief function which the presumption performs (outside of fixing the burden of proof). That is, to disabuse (if it may be) the jury's mind of any suspicion or prejudice arising out of the mere circumstance that the defendant comes cringing and unshorn among those declared to be his peers, hand-cuffed and guarded by armed deputies, and charged by grand jurors drawn from the body politic, good and lawful men duly sworn, with deliberately killing a human being in cold blood. It is quite proper that such considerations pregnant with prejudice should be neutralized by frequent repetition of the formula.[43] The

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[41]Once the presumption has placed the burden of proof and compelled, by a fictional assumption of innocence *in limine*, proof of guilt beyond reasonable doubt, it has performed all that should reasonably be asked of it. Comparison is invited to the burden of proof in civil cases. It is placed on the plaintiff because he necessarily seeks to prove some deviation by the defendant from normal conduct. Since normal conduct is presumed to be consistent with due care, the burden should rest upon him who asserts the contrary. No one contends that such presumption has the vigor and stamina claimed for the presumption of innocence. Only a sentimental regard for the accused may explain the recognition of any distinction between the purpose, function, and effect of two presumptions. That the burden is greater in a criminal case is not here relevant. It is enough that in both cases the burden is fixed by the presumption.

[42]5 WIGMORE, EVIDENCE § 2511; Holt v. U. S., 218 U. S. 245 (1910); State v. Kennedy, 154 Mo. 268, 55 S. W. 293 (1900); THAYER, *op. cit. supra* note 38, app. 551; 1 WHARTON, CRIMINAL EVIDENCE (1935) § 69, 73; McBaine, *Presumptions, Are They Evidence?* (1938) 26 CALIF. L. REV. 519. "To consider a compelled assumption as evidence or to weigh it as evidence seems to involve a mental operation impossible of practical comprehension, to say nothing of understandable exposition or explanation to the jury". Morgan, *Some Observations Concerning Presumptions* (1930) 44 HARV. L. REV. 906, 908. Note (1924) 34 A. L. R. 939. See State v. Colonese, 108 Conn. 454, 43 Atl. 561 (1924).

[43]"Except for purposes of a fair and impartial trial before a petit jury, the presumption of guilt arises against the prisoner on finding of the indict-

frequent demand that the law be allowed "to take its course" is a euphemism for the demand that the law, instead of an outraged populace, be allowed to take the life of the accused. Guilt is in fact assumed. Indeed, at common law there were often cases where a presumption of guilt was indulged toward suspicious characters then (as now) arrested under such assumption and given summary punishment.

Hence even today an assumption of guilt is not inconsistent with a procedural presumption of innocence. Indeed it may be held heterodoxy to suggest that, while the law always compels an assumption of innocence, the public (from which the jury is selected) usually presumes guilt.[44] All the circumstances surrounding the alleged crime are usually more consistent with guilt. In addition to the considerations mentioned which show that the presumption is merely a verbal equivalent of the duty of the state to prove the defendant guilty, it may be recalled that there are occasions when the constitution[45] denies bail to an accused because "the proof is evident and the presumption (of guilt) great". Nor should his arrest be assumed to be accidental or unjust. In most cases his arrest is effected because incriminating circumstances pointed to him or because some responsible citizen took oath that in his opinion and belief the accused was guilty.

So that once the presumption has placed the burden of proof and compelled, by a fictional assumption of innocence *in limine* proof beyond reasonable doubt, it has performed all that should in reason be required of it. Once the seriousness of a criminal charge is recognized and emphasized by the requirement of a different degree of proof, there seems to be no good reason to ascribe to the presumption of innocence longer life than the presumption of due care in a civil tort action, or on the other hand, such presumptions as aid the state's case, for example the presumption of sanity. Further illustration of the peculiar and limited function of the pre-

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ment". *Ex parte* Ryan, 44 Cal. 555 (1872). Officers of the law attain the title of "hard-boiled" by merely yielding to normal intuitions and by giving play to obvious inferences. They are thus characterized by those who define constitutional rights in terms of a conscious leaning toward the side of the defendant.

[44]The distinction between assumption and presumption is advisedly here made. The former takes for granted certain axiomatic concessions. The latter is a recognized inference from proven facts as premises. *Cf.* McElvey, Evidence (4th ed. 1932) p. 117.

[45]Miss. Const. (1890) Art. III, § 29. After indictment, upon inquiry as to bail, defendant presumed guilty. *Ex parte* Ryan, 44 Cal. 555 (1872) cited *supra* note 43.

sumption of innocence is found in the rule that in a civil case where the issue of liability involves acts constituting a crime by the civil defendant, the plaintiff may not be compelled to overcome any presumption that the defendant is innocent of such criminal acts.[46]

The purpose of the defendant need rise no higher than the non-persuasion of a single juror. Accordingly he is apt to view the law as a "shield" not only against conviction, but also against justice. Such assertion, which perhaps ought to be supported, finds attestation in the frequent demand for instructions that the purpose of the law is to acquit and not to convict. Belatedly our court stamped this slur upon the law with its disapproval.[47]

The Two Theory Instruction[48]

This instruction has been held to apply only to cases based upon circumstantial evidence.[49] Yet this is not a helpful distinction, since (1) it is often difficult to determine whether a case is "based" upon direct or circumstantial evidence (It may be partly or wholly so.) ; (2) it is not always easy to convey to the jury an adequate distinction between the two.[50]

If the word "theory" belongs chiefly to deductive processes in circumstantial cases, the word "contention" could apply to all cases. The theory of the defendant is always his contention. Hence why should a jury not be compelled also to accept the contention, however supported, most favorable to the defendant?

As stated in *Runnels v. State*,[51] there are two reasonable theories in practically every case. The jury has the duty to accept or adopt whatever conclusion to which the evidence points their reason and conscience.

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[46]Bonelli v. Bowen, 70 Miss. 142, 11 So. 791 (1892).

[47]Mitchell v. State, 176 Miss. 873, 170 So. 534 (1936). Compare McCann v. State, 13 Sm. & M. 471 (Miss. 1840), where the following instruction was seriously pressed upon the court and held properly refused: "All the declarations of the defendant must be taken together. Those portions favorable to him are to be regarded by the jury as true, unless inconsistent with other evidence or impossible in their nature."

[48]". . . if there are two theories in this case, one consistent with the defendant's guilt and the other consistent with his innocence, it is your sworn duty to adopt the theory favorable to the defendant and find him not guilty."

[49]Jones v. State, 183 Miss. 408, 184 So. 810 (1938), citing cases.

[50]See 1 Wigmore, Evidence § 25.

[51]96 Miss. 92, 50 So. 499 (1909). Belief beyond reasonable doubt does not mean certainty. Yet a defendant's explanation (defense) may be "reasonable" although neither true nor sufficient. See Bills v. State, 105 Miss. 586, 62 So. 647 (1913).

The duty emphasized by their oaths is to "well and truly try the issue" and to bring in a "true verdict according to the law and evidence". The only thing they *must* do is to be guided in reason and conscience by the law given by the court and the evidence adduced by the witnesses. Their reasoning powers should not be swayed by prejudice nor influenced by any instructions susceptible of construction by the jury as the personal view of the trial judge.[52]

The original and most amazing form of the instruction required acceptance of the theory consistent with defendant's innocence "even though the oposite theory is more reasonable and supported by the stronger evidence". Requiring as it does the rejection of the better reason, and ignoring the stronger proof (probably under the influence of the erroneous doctrine that the presumption of innocence is "evidence" for the defendant's side of the scales), it is surprising that its condemnation was so long delayed.[53]

The Duty To Reconcile The Testimony With The Theory Of Innocence[54]

This instruction is sometimes combined with the one last discussed and its impropriety rests upon the same considerations. Both

[52]Further discussion of this principle is had under the topic "Miscellaneuos Circumstances", p. 291 *infra*. So far as the average juror is aware, the instructions are given by the court *sua sponte*. In practice this illusion is heightened by argument of counsel who invariably impress the jury with the assertions that "These are the words of the court, not mine", or "This is the court speaking to you", and the like. When the judge sits as judge and jury it is inevitable that his personal views be injected into his judgment. It would seem as futile to "instruct" the court by formal written instructions in order to eliminate his private predelictions, as it is to expect that advisory instructions to the jury will be free of them. Compare the rather farcical procedure in Touchard v. Crow, 20 Cal. 150, 163 (1862). Here the judge sat without a jury passing upon both the law and the facts. Through submitted written instructions he solemnly proclaimed that "the jury will not be concluded by statements of the court but are at liberty to judge of the facts for themselves." Before our snickers subside, we may examine whether we are yet entirely free from a fanatic faith in fictions.

[53]Roux v. State, 97 Miss. 559, 52 So. 485 (1910); Saucier v. State, 102 Miss. 647, 59 So. 858 (1912); Brady v. State, 128 Miss. 575, 91 So. 277 (1922); Wiley v. State, 129 Miss. 196, 91 So. 906 (1922); Cartee v. State, 140 Miss. 265, 105 So. 574 (1925). In the last case the instruction was refused. Counsel's argument on appeal cited no precedent except its age. Compare the invitation to stagnation made in McAlpine v. State, 47 Ala. 78, 82 (1872), where in refusing a requested instruction the court said, "Its very novelty was a sufficient reason for its refusal. It is a maxim of the law (sic) that 'the old way is the safe way' ". The court's addendum, "The courts will not sanction speculative novelties", suggests not only that the proposal for change is a novelty, but also the possibility that the proposition sought to be changed was in the first instance not only an innovation, but itself a novelty. Justice is not a grafted fruit; it is a seedling.

[54]This instruction follows the form of the Two Theory Instruction, quoted in note 48 *supra*, except that here the usual form is ". . . it is your duty

seem to assume that the jury should exert a conscious effort to acquit. Both borrow from the "Living Witness" instruction the fallacy that the presumption of innocence is evidence. There can be no "theory" of innocence except as hypothesized by the evidence. The evidence directed toward exculpation is the defendant's "theory of innocence". Advocates of this instruction are conservative enough not to require that it be reconciled with the presumption of innocence. This presumption is not a creature of reason or proof, as already shown, but exists and is forced upon the jury's attention to neutralize possible prejudice. The instruction here considered is premised by the condition "if there are two reasonable theories". What it necessarily means (if it in turn is to be reconciled with any theory of common sense), is that, once the defendant's proof has intimated some explanatory defense (theory), it may either borrow support from the state's theory, or so impair it as to justify its rejection. The jury's sole "duty" has heretofore been stated. Neither reason nor justice requires it consciously to enhance the defendant's proof nor discredit that of the state. Their duty is to reconcile their conclusions with their oaths, which means that sound probabilities are not to be ignored. Indeed, if their reason and conscience reconcile the evidence with their conclusion of guilt beyond all reasonable doubt, it is their duty to *reject* the theory of innocence.

It would seem elemental, save in rare exceptions (among which are directed verdicts), that no conclusions should be compelled except such as follow by law from preliminary and independent findings of fact by the jury.

The mind and mental processes of the jurors ought not to be directed into arbitrary channels nor standardized by legal formulas.[55] Since acquittal in a criminal case is more often a negative finding, such verdict means not so much that the defendant is innocent, as that he has not been proven guilty.[56] These processes should never be coerced by any requirement that they reconcile the evidence with any definite or arbitrary theory.

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under your oaths to reconcile the evidence to accord with the theory of the defendant's innocence, if you reasonably can . . .". Some bolder forms omit the last phrase.

[55]In Hartley v. State, 137 So. 518 (Miss. 1937), the court said: "The jury should be left to their own methods of reasoning from the evidence in the case."

[56]This may suggest the so-called Scotch verdict—"guilty but not proven". Yet respect for the law of the land is not inconsistent with respect for the laws of human nature and experience, pursuant to which latter, ninety percent, at least, of those indicted are guilty in fact. So that this ninety percent capitalize upon our solicitude for the innocent ten percent, as well as our just reverence for due process. For, regardless of the nonconformity of the verdict with the truth, the law itself must never be found guilty.

Before a jury reaches a verdict of innocence, their state of mind must have been (1) static with indecision, (2) affected with reasonable doubt, or (3) confirmed in the positive belief of innocence. They should be encouraged to believe that within the confines of the applicable law, they are free to range at large, moved solely by the compulsions of their own reason and conscience. The only thing they "must" do is to approach the hearing with an open mind and to weigh the evidence upon the scales of common sense and reason, admitting thereto from the outside such weights and counterweights as legal rules and presumptions authorize or require.

There should be no conscious effort to acquit or to convict.[57] The jury may in fact be admonished not to hunt for doubts or seek excuse or apology for its verdict.[58] Even as "reasonable doubt" defines itself, so verdicts should be found by the jury by following normal and intuitive ratiocination without being tipped off by the court as to whether in some fancied game of legal hide-and-seek they are getting "hot" or "cold".[59]

FALSUS IN UNO[60]

This widely known character has been loitering about the court rooms for a hundred years.[61] Tolerated at first as in inoffensive bystander, it came frequently as talesman to sit with the jury. In time it came to be identified with the official attaches of the court, and crowned a meteoric career by becoming consultant with the trial judge. As *amicus curiae* it also took part in many an argument to the jury.

In its early form in this state the instruction operated as a gratuitous suggestion of possible perjury. To relieve the expanding confusion in the mind of the jury as to what and how much was thus intimated, the courts provided a simple safety valve through the addendum, "provided you believe it to be untrue".[62] In other words,

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[57]See note 47 *supra*, and accompanying text.

[58]Jones v. State, 130 Miss. 703, 94 So. 851 (1923); *Cf.* Klyce v. State, 78 Miss. 450, 28 So. 827 (1900).

[59]Williams v. State, 73 Miss. 820, 19 So. 826 (1893), *aff'd*, 170 U. S. 213 (1897); Boutwell v. State, 165 Miss. 16, 143 So. 479 (1932).

[60]". . . the jurors are the sole judges of the weight and worth of the testimony and the credibility of the witnesses [here the instruction should end] and if the jury should believe from the evidence that any witness has knowingly, unlawfully, wilfully, and falsely sworn corruptly to any material matter, you may entirely disregard the testimony of such witness".

[61]See 2 WIGMORE, EVIDENCE § 1008 *et seq.*

[62]Miller v. State, 35 So. 690 (Miss. 1904).

"no matter what the court says, if any testimony is untrue, don't believe it". It should therefore have remained immaterial what the court said. The better course obviously would have been for the court not to say anything.

Early decisions held that the instruction was discretionary, and "unless the judge has suspicion of corruption", it should not be allowed.[63] The inevitable result of such a doctrine is that whenever the instruction is given it carries with it the view of the judge that, somewhere in the local Denmark there is something rotten. In other words, if the jury does not know at whom the judge was looking when he thus impliedly intimated that someone had lied, the instruction is futile; if they do know it is fatal.[64]

Even as the notorious "Sinker Instruction" impliedly assumed the possibility of corruption so *"falsus in uno"* assumed that about the edge of the cloud of witnesses there was a lining that was definitely not pure silver. If obvious to the trial judge or to counsel, it should be so to any juror competent to be qualified as such. Besides, counsel, alert even to desperate opportunities, need neither sanction nor suggestion from the court to argue vigorously the possibilities of corruption.

Our courts have staged many a discussion as to the verbiage of this legal and practical platitude. Chiefly it must refer to false swearing as to "any material matter". When courts disagree as to what is a material matter, can jurors be expected to agree to a workable definition under those conditions which obtain when jurors are forcibly locked up away from their own farms, firesides and fortunes? Why, again, "any material matter"? It is suggested that if a witness wilfully swears falsely to some immaterial matter—with nothing at stake—he would be more apt to swear corruptly when it was clearly advantageous. If the witness would lie when it did not matter, he most certainly would if the matter were of life and death. The instruction borrows this phrase haphazardly from the technical requirements of an indictment for perjury, and the bases of impeachment. By such technical rules of law one, although a consistent liar, may be acquitted of perjury or saved from impeachment.

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[63]"If there is no occasion for the application of the doctrine of *falsus in uno* the court ought not to give it." State v. Allen, 111 La. 454, 35 So. 495 (1903). *Cf.* 14 R. C. L. p. 737, § 11.

[64]Where the instruction is given for the state, and the defendant is his only witness, it is error. Layton v. State, 56 Miss. 791 (1879); Busby v. State, 177 Miss. 68, 170 So. 140 (1936). Analogous errors: unduly emphasizing a particular phase of the evidence, Gurley v. State, 101 Miss. 190, 57 So. 565 (1911); the testimony of a particular witness. Busby v. State, *supra.*

Later our court began reversing cases although the instruction followed the older formula, because the jury was not instructed that the swearing, although unlawful, felonious, knowing, wilful and false,[65] could not be disbelieved unless it was climaxed with "corruption". It should be borne in mind that the form of the instruction is never mandatory, but permissive. This means that if the jury has good grounds, arising in the evidence, for disbelieving a witness, it may do so. Any juror "above the age of twenty-one years and able to read and write" not only knows that he can do so, but indeed will do so, whether authorized or forbidden.[66] Since each juror knows that it is his privilege—his exclusive privilege as other instructions so habitually inform him—he is apt to conclude from the emphasis of this instruction that the particular case is malignant with corruption.

Nor should it be justified as a usual inference that a witness who will lie about one thing will lie about all.[67] The instruction, like most others, is addressed to the entire jury. Unanimity in the jurors in this respect should not be a condition to the applicability of any instruction, save those relating to the ultimate finding of guilt.

In *Jeffries v. State*[68] the language used was "if they believe . . . that any witness has sworn falsely to any material matter or that his testimony is unreasonable . . .". It was held error because the disjunctive was used. This would mean that a juror may reject all testimony where part is believed to be wilfully false, yet may not do so if such testimony is unreasonable. This, too, in spite of the fact that belief of guilt must be beyond a reasonable doubt.

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[65]Omission of "intent" winked at in Owens v. State, 80 Miss. 499, 32 So. 152 (1902). Must be intentional, State v. Wofford, 99 Miss. 759, 56 So. 162 (1911).

[66]In Davis v. State, 89 Miss. 111, 42 So. 541 (1906), the instruction was held error because it "required" rejection of such testimony under the conditions named. This is, of course, sound. Yet it would consist better with judicial practice if the court would tell the jury of their duties rather than their privileges. It is difficult to tell a jury that it *may* do a particular thing without the intimation that it *must* do so.

[67]2 WIGMORE, EVIDENCE § 1010. The instruction does not refer to admissibility but to the weight of evidence. *Id.* at 100. If a truism or a generality, it belongs in argument. It is probably true "that a man of dangerous character is more likely to make a deadly assault than a man of peaceable disposition", yet it was error to so instruct. Ellis v. State, 65 Miss. 44, 3 So. 188 (1887). Despite our adherence to the doctrine of *falsus in uno*, it was error to instruct that a man who will lie in one material matter is not to be credited in others. Finley v. Hunt, 56 Miss. 221 (1878); Davis v. State, 89 Miss. 119, 42 So. 541 (1906).

[68]Jeffries v. State, 77 Miss. 757, 28 So. 948 (1900).

In *Hughey v. State*[69] case the usual form was allowed plus permission to the jury to consider also the demeanor of the witnesses. This is consistent at least, since it introduces other factors by which every juror, without suggestion from the court, is instinctively influenced.[70]

The cases cannot all be considered. A few are subjoined in the note.[71] They afford many inconsistencies, as may be expected when the trial judge is asked to walk the chalk line between rules of law and habits of humans. His desire to avoid offending the defendant who has many rights, including the right of appeal, is often more influential than his fear of increasing the already heavy burden of the state.

It suffices that the instruction has been sufficiently condemned judicially to save any attack upon it from savoring of radicalism.[72] It would seem to be better judicial policy (conceding for discussion that there is a discretion here), upon proper occasion, to curb the natural tendencies or reactions of triers of fact ordinarily subject to over-emphasis, than to over-stimulate them by stressing obvious and well understood mental processes. This is not trial by jury, but by judge and jury.

The instruction should be tried by its own philosophy. If it is false in any particular, the court ought to have and exercise the right to reject it altogether.[73] If the instruction has sufficient substance

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[69]Hughey v. State, 106 So. 361 (Miss. 1925).

[70]See People v. Chamberlain, 7 Cal. (2d) 257, 60 P. (2d) 299 (1936), where the court assumed, as inevitable, that the demeanor, mannerisms and even the personal appearance of the defendant (as well as other factors) were observed by the jury and necessarily entered into their verdict. This is a safer assumption than that a jury has to be told how to reason, or that testimony that is *falsus in uno* is *falsus in omnibus.*

[71]Summary reference is made to 5 MISS. DIGEST (1936) Crim. Law, Key Nos. 785, 785a.

[72]In Owens v. State, 63 Miss. 450 (1886) the court stated that such matters need no suggestion from the court. It was held to be an "exploded relic of the past" in McDonald v. State, 28 So. 750 (Miss. 1900). Its refusal was upheld in State v. Banks, 40 La. Ann. 736, 5 So. 18 (1888) where the court said in effect that the jury are the sole judges of the witnesses and their testimony, and should be left alone. In Turner v. State, 95 Miss. 879, 50 So. 629 (1909), it is upheld. A dissent by one who as former trial judge had refused it refers pointedly to McDonald v. State, *supra*, and Bell v. State, 90 Miss. 104, 43 So. 84 (1907) wherein it was called "dangerous". See Hartley v. State, 161 Miss. 667, 137 So. 518 (1937) which deplored the placing by instructions of "the jury's process of reasoning into a mental strait-jacket". In Turner v. State, *supra*, the instruction was conceded some dignity and respect on account of its age. In this connection see note 79 *infra*. We inquire whether it is best to grant it an old age pension, when what is clearly indicated is a mercy killing.

[73]In Davis v. State, 89 Miss. 119, 42 So. 541 (1906), cited *supra* note 66, the form was described as "*falsus in uno* in its most objectionable form". It is suggested that there are also degrees of murder; but they are all criminal.

to rise only to the grade of doubtful merit, or the negative quality of being "harmless", it is at best legal rubbish and should be swept away.

THE "ADVISORY" INSTRUCTIONS

The older juries were drawn from those who in most cases were actual witnesses. Their verdicts were largely infused with prejudice, resentment and vengeance.

The idea of a jury impartial because of its very ignorance of the circumstances or the anticipated evidence, was tardy in taking its place in our juristic system. The practice of "instructing" the jury was a natural evolution and made available to the trial judge virtual control over the jury by influencing verdicts and, upon proper occasion, directing them. Formerly the judges assisted the triers with suggestions.[74] The versatility of the early trial judges was revealed by their assumption of the role of witness, advocate, or advisor.

In the path of these powerful currents of influence the people struggled to build protecting dikes. In our state both the tendency and the legislative purpose were early disclosed in our statute[75] forbidding the trial judge to comment upon the testimony or charge the jury as to the weight of the evidence.

Occasional leaks, however, soon began to appear in ominous threat to the whole procedural structure. Even an occasional judicial thumb, pressed against the persistent trickling caused by the impounded pressure of thwarted prerogative, might have kept the statute from becoming soggy with nullification.[76]

Juries, repeatedly assured by the law that they are the sole judges of the facts and the weight and worth of the evidence, began to be told, in effect, that even though this be true, the trial judge, if he were in their place, would pay very little attention to this or that witness or would weigh this or that evidence with care. Too often, the judges in putting the evidence upon the scales for the pondering of its weight by the jury, caused imbalance by a belated removal of the weight of his own hand.

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[74] 4 WIGMORE, EVIDENCE § 2056. See note 46 *supra*.

[75] MISS. CODE ANN. (1930) § 1530.

[76] An ample thumb was sought to be pressed against such leak in Calloway v. State, 155 Miss. 706, 125 So. 109 (1929), cited *supra* note 3. Our court had theretofore viewed the pending disaster with a modicum of alarm in Pederre v. State, 99 Miss. 171, 54 So. 721 (1911) when it conceded that "the jury should be permitted to judge, uninfluenced by the views of the court". See note 73 *supra*. Wigmore speaks somewhat mournfully of "these days when too much emphasis is placed, in the selection of jurors, on the blankness of their mental tablets". 5 WIGMORE, EVIDENCE § 2570.

Let us view a few illustrations of how our judges have sometimes stepped out of character and joined, now the witnesses, now the advocates.

Normal men may under the law qualify as triers of fact, yet it is not always true that the law qualifies jurors as normal men. For all men are presumed to have common sense,[77] to be sane and reasonable, and to possess an experience with and knowledge of human nature. Yet often we seem to assume that the jurors check these qualities in the anteroom with their hats. As members of the electorate they may be gentlemen and scholars; when empanelled they become merely "gentlemen"—of the jury.

Briefly summarizing these cases where the courts have allowed or refused cautionary instructions, it is found that their very confusion not only defies any hope for co-ordinating their rationale, but forbids their reduction to any common denominator of reason. In common, all have significantly the feature that it is always the state's witnesses or testimony that the jury is cautioned against.

Although not cataloguing or digesting these holdings with a view to resolving them into fixed patterns, but with the hope that by their very diversity, controlled, though it may be at times by diverse circumstances, the wisdom of a literal compliance with the prohibition of the statute may be vindicated. Chiefly, however, these inconsistencies of themselves reveal the error of allowing incursions into the letter and spirit of our statute.

The justification for cautionary instructions has been found to lie in the fact that they "obtained their place in the law out of generations of judicial experience".[78] This seems to suggest that the judicial experience of the courts transcends the practical knowledge and experience of those other humans who serve as jurors.[79]

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[77]Cold Sunday Case, 78 Miss. 140, 28 So. 807 (1901).

[78]Hood v. State, 170 Miss. 530, 155 So. 679 (1934). It is not enough to say that cautionary instructions are discretionary. Brown v. State, 173 Miss. 542, 158 So. 339 (1935). What is urged is that such discretion be exercised vigorously to the end that only in the exceptional case should the court "advise" the jury. The policy that serious doubts as to instructions should be resolved in accused's favor [Gambrell v. State, 92 Miss. 728, 46 So. 138 (1908)] should guarantee that the state's burden will not be too much lightened.

[79]For a discussion of judicial knowledge of jurors, see 5 WIGMORE, EVIDENCE § 2570. The doctrine that "the jury are the best judges of facts, and the court the best judge of the law", was given early sanction in Georgia v. Brailsford, 3 Dall. 1, 4 (Ga. 1794), and in STARKIE, EVIDENCE 1245, 1254. It may be that these instructions are "approved by the general usages of judges" [THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) p. 550]; or "have obtained their place in the law out of generations of judicial experience", [Hood v. State, 170 Miss. 530, 155 So. 679 (1934)], yet, if their original expression

Until human experiences are crystallized into law, human conduct and practical influences are not matters of law, of which the judge is the sole mentor, but are facts as to which the jurors should be supreme. It may seriously and respectfully be doubted whether our judges as such have as much occasion to deduce from experience rules of human conduct as those triers of fact who, with their door shut to the court's ear, weigh testimony, appraise witnesses and arguments and bring philosophy, religion, reason, gumption and even unconscious bias to bear upon the ceremony known as "considering their verdict". Judicial knowledge in respect of those varying degrees of influence involved must be gained by guesswork, inference, or hearsay.

The very contention that such instructions usually express evident truths itself argues most strongly against allowing them.[80] If evident, they are so to all men, whether on the bench, at the bar, or in the jury box. If a universal acceptance was sought to justify them, this would mean that they are plain generalities available, if at all, to both parties.[81]

It should be repeatedly stressed that the inferences which these instructions "authorize" the triers to make, or the suggestions of caution or emphasis therein, are of themselves entirely relevant and reasonable. Many of them have become embodied in instructions because their sound logic and reason caused trial judges to recoil at repudiating their evident truth. But the emphasis is misplaced. Their reason and reasoning are indeed quite relevant. The error is that

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was an invasion of the jury's function, error should not be expected to ripen, with age, into truth. Compare note 53 *supra*. In Harris v. Pounds, 187 So. 891 (Miss. 1939), it was conceded that the jury may take into account such matters of common knowledge and experience as may constitute judicial notice. The language "but their province here is no broader than that of the judge", by conceding that it is *as broad* as the court's, goes further than earlier decisions. The judicial knowledge of the judge may go beyond his actual knowledge. This is not the case with the jurors. Hence the "judicial experience" of the jury is less a fiction than that ascribed to the court. Lest, in the last named case, the court seem to concede too much, the opinion added "The judge still has power and supervision over jury verdicts". See note 74 *supra* and text at p. 286 *supra*. "Judges have always been suspicious of juries and have seized every opportunity to establish rules for their guidance and to control their conclusions from the evidence introduced." McKELVEY, EVIDENCE (4th ed. 1932) p. 82.

[80]The more evident the truth the more apt it is to become a "truism" and as such unsuitable material for instructions. See note 23 *supra* and accompanying text.

[81]Judicial knowledge is such as is common to all men, Kitchens v. State, 191 So. 116 (Miss. 1939). It can be seen that a generality of fact or experience applicable to both parties should be allowed to neither. In those cases where such instructions are given to the defendant, the state's only recourse is to neutralize them with similar charges.

the judge, by so expressing himself, becomes of counsel. To the extent that the subject matter is relevant, counsel may and should be entrusted with the responsibility of regaling the jury therewith, no doubt with boisterous emphasis.[82] Let us examine some of these instructions.

The Testimony of Accomplices[83]

Courts are careful to charge juries that the defendant is not to be disbelieved merely because he is the defendant. Emphasis may not be laid upon his interest in the case. His testimony is to be "weighed as that of any other witness".[84]

This, however, applies when and because he is the defendant, and in spite of the relevant fact that he is very much interested. Indeed the defendant's version of the case, if uncontradicted and reasonable, must be believed; so much so that he is entitled to a directed verdict of acquittal.[85]

Yet when the same defendant, although jointly indicted with another, becomes a witness against such other, the case is quite different. So that the defendant of today may be the accomplice of tomorrow, and his testimony then subjected to judicial suspicion. Their roles may have changed, but not their hearts nor their motives for false swearing. As a defendant, his testimony is weighed as that of any other witness; as an accomplice "it must be weighed with great care and caution". Certainly a defendant is an interested witness, and a co-defendant not on trial is an accomplice. Nor has it seemed to matter that a defendant is more apt to lie to save his own neck, than is a mere accomplice (a defendant not on trial) who is moved only to the degree of his interest in an alien neck.

Insofar as suspicion of such testimony is based upon the assumption than an accomplice will seek to exonerate himself, his testimony is of the same weight as that of the defendant. It is interesting to

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[82]In the argument counsel may draw any inference which the facts tend to support. Bufkin v. State, 134 Miss. 116, 98 So. 455 (1923). Such argument need not be sound, Hartfield v. State, 189 So. 530, 542 (Miss. 1939) (dissenting opinion).

[83]". . . that while the testimony of an accomplice may be received, such testimony must be weighed and considered with great care and caution . . ."

[84]If the only reason for disbelieving the defendant is because he is the defendant, the jury are instructed that his testimony must be taken as true. Cook v. State, 150 Miss. 539, 117 So. 344 (1928). Consistency would seem to require that such instruction be available to the testimony of any other witness, even an accomplice; for be it remembered the defendant here is being viewed only in his capacity as a witness and not as a defendant.

[85]Weathersby v. State, 165 Miss. 207, 147 So. 481 (1933).

suggest, without here solving, the dilemma where two accomplices are tried jointly. Each is a defendant and an accomplice. Moreover there are two of each. Each testifies but once. By what principle is the testimony of each to be adjudged?[86]

Rather than rationalize upon the merits of the instruction itself, let us examine some cases illustrative of the uncertainty which attends any attempt to tell the jury how to appraise the credibility of witnesses. It is sufficient to add that the asserted rationale of the instruction seems not to have taken into account the two outstanding and conflicting motives usually present—to save oneself, or to convict another. If a third motive exists—to admit guilt thereby implicating the joint defendant—the case falls obviously in the catagory of admissions which in turn are also "viewed with suspicion".[87] In other words, if an accomplice denies his guilt it is to be weighed with caution; if he admits it, his admission is likewise to be looked at askance.

Admissions and Confessions[88]

Most discussions regarding the weight and worth of such instructions assume that voluntary admissions of guilt are inferior as testimony. As heretofore observed, the belief of the court in the truth of the comments thus made through the instruction creates an aversion to discredit such accepted truth by refusing instructions thereon. Thus the asserted soundness of this generality is apt to be confused with the question of the propriety of its expression through instructions.

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[86]This dilemma has led to complicated rules. See Lewis v. State, 85 Miss. 35, 37 So. 497 (1904); Benson v. U. S., 146 U. S. 335 (1892); MISS. CODE ANN. (1930) § 1400; 16 C. J. p. 572, § 1112, p. 684, § 1398 *et seq.*; UNDERHILL, CRIMINAL EVIDENCE (2d ed. 1910) § 70; 1 WIGMORE, EVIDENCE § 580. Judge Thayer, revered as the high priest of the law of Evidence, says, "In law the evidence of an accomplice is as good as any other; in fact, it is found often unworthy", THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) p. 550. Had the eminent author not so observed, it might have been suggested that the reverse seem to be the case. In actual practice such testimony is often true, yet the law holds it inferior. Is it helpful to say that this or that evidence is "good" or "bad" as a matter of law? It ought to be considered worthy or unworthy according to the judgment of the jurors. It may indeed be often unworthy. If so, it should be so found by the triers of fact. It is quite possible that the effect given such testimony is known only to the jury who weigh it. The "experience of judges" in this respect need not be presumed to be "superior". See notes 74 and 81 *supra.*

[87]See later discussion of Admissions and Confessions.

[88]This topic has too many ramifications for discussion here. Again, the emphasis ought not to be upon the weight to be given them, but upon the principle that the jury alone ought to be allowed to adjudge their weight.

For example, in an early case[89] it was held proper to refuse an instruction that admissions are "among the best evidence known to the law". Putting aside the question as to the correctness *vel non* of the assertion as an observation of experience, it is significant that the refusal thereof was based upon the view that it was a "comment upon the weight of the evidence", and involved some "constraint of the opinion of the judge". The reason given is of more interest and point than its result. If such is the basis of its condemnation, the expression of the opposite view would likewise be so.[90]

If a confession is not coerced, human experience supports the view that such confession of guilt is entitled to the highest consideration. It is self-accusing rather than self-serving. The first impulse of a guilty man is to purchase liberty even at the cost of falsehood. To hold otherwise is to assume that a defendant would rather have his neck broken than his word. The average jury cannot make the defendant's denial of palpable guilt palatable to their reason without a large grain of common salt.

Here again confusion has followed from the tendency of the courts to project into the instruction a persistent anxiety which should have been completely satisfied and allayed in passing upon its admissibility in the first instance. If judicial suspicion thereafter hovers about the confession, once admitted, it but reflects the mental reservation of the trial court as to the propriety of its reception as a voluntary statement.

The resultant diversity of opinion as to confessions is indicated in the subjoined note.[91]

Miscellaneous Circumstances

Our discussion has reached its permissible limits. In the categories heretofore considered there ought to be placed: flight by the

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[89]Thompson v. State, 73 Miss. 584, 19 So. 204 (1895).

[90]Ellis v. State, 65 Miss. 44, 3 So. 188 (1887), see note 67 *supra.*, and text p. 284 *supra.*

[91]The instruction held proper: Keithly v. State, 10 Sm. & M. 192 (Miss. 1848); Green v. State, 55 Miss. 454 (1877); Haynes v. State, 27 So. 601 (Miss. 1900). The instruction is improper: Bobo v. State, 16 So. 755 (Miss. 1894); Benfrow v. State, 154 Miss. 523, 122 So. 750 (1929); Harmon v. State, 168 Miss. 417, 150 So. 904 (1933). The jury cannot reject for incompetency, once admitted. Ellis v. State, 65 Miss. 44, 3 So. 188 (1887).

accused;[92] dying declarations,[93] circumstantial evidence; and all merely argumentative instructions.[94] As to each of these topics our courts have expressed conflicting opinions. Even as courts differ regarding their weight, so do juries. But to the latter alone does the statute entrust such duty.

It is just as reasonable to assume that triers of fact weigh all evidence "with care" as that they are not influenced by instructions which they construe as the personal views of the trial court.

Some instructions are given solely because their truth commends them; others are refused in spite of their truth. The test should be whether they "instruct" the jury—namely, whether they add to their store of experience, reason, and common sense, by supplying some principle or inference known only to the law. It must instruct, not confuse.[95]

Even as mushrooms and toad-stools, almost identical in appearance—though extremes in wholesomeness—are distinguished by slight identifying marks, so may we in most cases separate the wholesome instructions from those that are not. The former are apt to begin with the identifying phrase "if the jury believe", thereby presaging a conclusion compelled by the law of the case after a finding

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[92]Flight consistent with innocence as well as guilt, Howard v. State, 182 Miss. 27, 181 So. 525 (1938). Guilt may be inferred as a matter of law, Ransom v. State, 149 Miss. 262, 115 So. 208 (1928); May be considered, Sims v. State, 164 Miss. 16, 142 So. 468 (1932). Error to instruct that guilt can be inferred from flight, Howard v. State, *supra*. Error to refuse instruction that jury may consider defendant's surrender, etc., Bell v. State, 89 Miss. 810, 42 So. 542 (1906). Yet not that refusal to flee is evidence of innocence, Banks v. State, 145 So. 104 (Miss. 1933).

[93]Entitled to greatest weight, Pearson v. State, 226 S. W. 538 (Tenn. 1920); Hale v. State, 16 S. W. (2d) 1068 (Tex. 1929). Jury may consider it together with all the other evidence. Jones v. State, 70 Miss. 401, 12 So. 444 (1893). The court should cautiously admit it, but its weight is for the jury, Ward v. State, 75 Fla. 756, 79 So. 699 (1918); WHARTON, CRIMINAL EVIDENCE (1935) § 574. See also Chase v. State, 147 Miss. 694, 112 So. 785 (1921); Wilkerson v. State, 134 Miss. 853, 98 So. 770 (1924). In Gurley v. State, 101 Miss. 190, 52 So. 565 (1912) it was directly held that once the dying declaration is admitted, its credibility is exclusively for the jury. See Baylis v. State, 182 Miss. 794, 183 So. 527 (1938), Comment (1939) 12 MISS. L. J. 253.

[94]For example, the witness's power of recollection or opportunity to observe, Huddleston v. State, 134 Miss. 382, 98 So. 839 (1924). Yet if an instruction is argumentative it is bad, Carter v. State, 140 Miss. 265, 105 So. 514 (1925). Instruction may "authorize" jury to consider a witness's interest, Waldrop v. State, 98 Miss. 567, 54 So. 66 (1911); Y. & M. V. R. R. v. Alexander, 182 Miss. 654, 179 So. 266 (1938). But not the lack of interest. That they may consider flight by the accused, see note 92 *supra*, but not failure to flee, Banks v. State, 145 So. 104 (Miss. 1933). In Y. & M. V. R. R. v. Alexander, *supra*, the reason given for approving the instruction was that it "did not point out any particular witness". Compare this basis with a contention that it did point out a particular testimonial factor.

[95]Graham v. Brummett, 182 Miss. 580, 181 So. 721 (1938).

by the jury of the facts. The latter class may be identified by the apparently innocuous phrases "you may consider" or "you may (or ought to) take into account". These latter are invariably preludes to judicial comment upon the weight of the evidence or undue emphasis upon a particular phase or witness. They ignore the obvious truth that the jury needs no judicial authority to consider the evidence. Because they are jurors they may and, indeed, must consider every syllable of admitted testimony, for the court, by admitting it, has given them such privilege and duty.

In a quite recent case[96] the learned trial judge in good faith and with worthy motive interposed during examination of a witness in a misdemeanor case to make a relevant inquiry. Our appellate court construed the intervention as capable of an inference of bias, and held the trial court guilty of reversible error. There is no criticism of the holding. If it could be utilized to stress the need of a consistent policy of withholding from our instructions whatever the jury may construe as the personal opinion or bias of the judge or as a suggestion as to the weight of the evidence, it would be a useful precedent. In both cases the error arises out of an improper use of the court's influence. The only difference is that in the cited case, this influence was inferable solely from the oral question by the court. In the latter cases the influence is directly expressed in formal written instructions directed to the jury by the court.

A Suggested Remedy

A direct remedy would be to exercise the right to reject all merely advisory instructions as discretionary.[97] Yet if such instructions are found in future records, an alternate remedy may be found in the utilization of a statute[98] which permits appeals by the state upon errors of law. It may be drawing too heavily upon the courage and conviction of trial judges to deny to the defendant instructions now venerated at least by age. It may be that our appellate court may frankly concede that it has been re-quoting rather than re-examining some of these tolerated traditions.

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[96]Breland v. State, 180 Miss. 830, 178 So. 817 (1937). "The examination must not indicate his (the court's) opinion of the value thereof", nor "the judge's opinion of the witness's testimony". Compare holding that when objection was made to argument, the trial court's ruling thereon in presence of jury erroneously injected influence of court. Hartfield v. State, 189 So. 530 (Miss. 1939).

[97]Advisory instructions held discretionary. As to accomplice, see Wellborn v. State, 140 Miss. 640, 105 So. 769 (1925). As to cautionary instructions, see Brown v. State, 173 Miss. 542, 158 So. 339 (1935).

[98]Miss. Code Ann. (1930) § 19.

It would unquestionably save time, error, inconvenience and expense for all concerned if it were recognized that the permutations and combinations derivative from such factors as race, interest, disposition, kinship, temperament, humors, age, sex, profession, human nature and experience, prejudice and the like, plus the infinite subjects of testimony, are too numerous and intricate for judges to standardize; and, moreover, that this is why juries were born.

LEGAL ASPECTS OF ADMINISTRATIVE HEARINGS AND FINDINGS*

PART I

Elden S. Magaw†

INTRODUCTION

The Constitution provides[1] that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Also[2] "the executive power shall be vested in a President of the United States of America." It further provides[3] that "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." It is, therefore, apparent that our Constitution was drafted on the basis that the first principles of a government of laws and not of men, required a separation of legislative, executive and judicial powers. Having been subjected to a tyrannical form of government, it is not surprising that the framers of our Constitution should have been influenced by the theories of Aristotle, Locke, and Montesquieu.[4]

Even before the adoption of the Constitution of the United States, the principle separation of powers had been approved. The Constitution of Massachusetts, adopted in 1780, contains a "distributing clause" which provides that "in the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise legislative and judicial powers, or either of them; the judicial shall never exercise legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."[5]

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[1]U. S. CONST. Art. I, § 1.

[2]U. S. CONST. Art. II, § 1.

[3]U. S. CONST. Art. III, § 1.

[4]See Sharp, *The Classical American Doctrine of "The Separation of Powers"* (1935) 2 U. OF CHI. L. REV. 385.

[5]The State Constitutions, in the absence of a distributing clause, accept the doctrine of separation of powers by express provision that the legislative power shall be vested in the legislature, the executive power in the governor, and the judicial power in the courts. It is to be noted, however, that the adoption by the states of the doctrine of separation of powers is voluntary and not necessitated by the Federal Constitution. In Prentis v. Atlantic Coast Line Co.,

Although the Constitution of the United States does not contain a "distributing clause" the principle of the separation of powers has been accepted in our system of Constitutional jurisprudence,[6] and has been judicially declared to be one of the chief merits of written Constitutional law. In *Kilbourn v. Thompson*, the court said:[7]

"It is believed to be one of the chief merits of the American system of written constitutional law that all the powers intrusted to government, whether state or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of the branches shall not be permitted to encroach upon the powers confided to the others, but each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

This doctrine of the separation of powers was the first obstacle which had to be surmounted in the development of administrative law in this country. With the doctrine of separation of powers must be considered its corollary, that a power once vested may not be redelegated. This idea finds expression in the maxim *delegatus non potest delegare*. "One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."[8]

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211 U. S. 210, 225 (1908) the court said: "We shall assume that when, as here, a State Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned."

[6]WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES (2d students ed. 1929) 681.

[7]103 U. S. 168, 190 (1880).

[8]COOLEY, CONSTITUTIONAL LIMITATIONS (7th ed. 1927) 163.

A rigid adherence to the principle of separation of powers and the maxim *delegatus non potest delegare* would, of course, have made impossible the development of a system of administrative law. Obviously, if all the powers of government were included within the three co-ordinate departments enumerated in the Constitution, and there could be no delegation of these powers, there could be no place for administrative agencies in the constitutional system of this country. However, beginning with the creation of the Interstate Commerce Commission, there has been a phenomenal development in our law due to the establishment of boards, bureaus, and commissions. Not only are legislative and judicial powers delegated, but also are exercised in combination. This change has been described as fundamental, "because the law at least in some of its aspects no longer emanates from the Legislature, is no longer wholly declared and enforced by the courts, and, to the extent that this is true, we have departed from the fundamental principles upon which our political institutions rest."[9]

This acceptance of the administrative process into our system of constitutional government must be considered in the light of the fact that, under the Constitution, the powers of Congress are not only delegated, but also enumerated. After providing[10] that "all legislative powers herein granted shall be vested in a Congress of the United States," the Constitution, in Article 1, Sec. 8, enumerates the powers of Congress, and in the Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Nowhere in the Constitution is there a specific provision authorizing Congress to delegate authority, to establish administrative tribunals and to provide for administrative legislation, or administrative determination of causes. Yet the Supreme Court, for reasons that will later appear, has decided that the power, subject to certain limitations, exists, although apparently precluded by the doctrine of separation of powers, and the principle that delegated authority cannot be redelegated.

Congress was not slow in exercising this power. Statutes were enacted conferring upon executive officers the duty of administering certain laws; tribunals were set up with powers which were a combination of the legislative, executive, and judicial functions.

[9]Rosenberry, J., in State *ex rel.* Wisconsin Inspection Bureau v. Whitman, 196 Wis. 472, 494, 220 N. W. 929, 937 (1928).
[10]U. S. CONST. Art. I, § 1.

Since the authority that exists is statutory in its origin, it follows that the validity of its exercise depends upon the constitutionality of the statute involved. It is obvious that no statute enacted by Congress is valid if inconsistent with the provisions of the Constitution from which Congress derives its powers.[11]

Attention will now be turned to the cases for the purpose of determining the requisites of a valid delegation of powers, and incidentally, the line of reasoning adopted by the courts in upholding the constitutionality of statutes providing for the delegation of powers. Although no Congressional delegation had been held unconstitutional until 1935,[12] certain principles had become well established. The *Aurora v. United States*[13] is the first case in which the question of a delegation of legislative power was raised. The issue was whether Congress could make the revival of the non-intercourse acts of March 1, 1809, depend upon a subsequent proclamation of the President that either Great Britian or France had revoked or modified certain edicts so that they ceased to violate neutral rights. The validity of the statute was sustained, the court saying:[14] "We can see no sufficient reason why the legislature should not exercise its discretion in reviving the Act of March, 1809, either expressly or conditionally, as their judgment should direct." The conclusion is that it is within the power of the legislative branch to enact a statute and provide that it shall become effective upon the happening of some event or contingency, to be determined by the executive, or some designated agency.

This doctrine was extended and justified in the case of *Field v. Clark*.[15] The third section of the Tariff Act of October 1, 1890, provided that "whenever, and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea,

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[11]Marbury v. Madison, 1 Cr. 137 (U. S. 1803).
[12]Panama Refining Co. v. Ryan, 293 U. S. 388 (1935).
[13]7 Cr. 382 (U. S. 1813).
[14]*Id.* at 388.
[15]143 U. S. 649 (1892).

and hides, the production of such country, for such times as he shall deem just. . . ." The Act further made provisions for the duties to be levied and collected while the suspension lasted. In the course of the opinion, the court said:[16]

"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

Then, after holding that Congress had not attempted to delegate legislative power to the President, the court said:[17]

" 'The true distinction' as Judge Ranney speaking for the Supreme Court of Ohio has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' *Cincinnati W. & Z. Ry. Co. v. Clinton County Comrs.*, 1 Ohio St. 88. In *Moers v. Reading*, 21 Pa. 188, 202, the language of the court was: 'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.' So, in Locke's Appeal, 72 Pa. 491, 498: 'To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know. . . . The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law making power, and, must, therefore, be a subject of inquiry and determination outside the halls of legislation.' "

The problem of delegation is also presented by a statute which confers upon an executive or administrative agency, authority to establish rules and regulations which shall be binding upon the

[16] *Id.* at 692.
[17] *Id.* at 693.

public. From the beginning of government such acts have been passed, and have beeen attacked as unconstitutional, on the ground that Congress could not delegate the power to make laws. It was early recognized by the Supreme Court that there was a distinction between legislative power to make laws and administrative authority to make regulations. In 1825, Chief Justice Marshall in *Wayman v. Southard* said:[18] "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself." He did not determine what these non-legislative powers were, but he observed[19] that "the line has not been exactly drawn, which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

Subsequent cases established the proposition that while Congress could not delegate its policy forming functions, which are the essence of legislative power, it could nevertheless, after declaring its will by laying down policies and establishing standards, leave to selected instrumentalities the making of subordinate rules within prescribed limits, and the determination of facts, to which the policy as declared by Congress is to apply.

In *Buttfield v. Stranahan*[20] the question of the constitutionality of a statute[21] known as the Tea Inspection Act, was before the court. Section 1 of the Act made it unlawful "to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section 3 of this act, and the importation of all such merchandise is hereby prohibited." Section 2 provides for the appointment by the Secretary of the Treasury of a board of tea experts "who shall prepare and submit to him standard samples of tea." Section 3 provides that the Secretary of the Treasury, upon the recommendation of said board "shall fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of teas imported into the United States" and that "all teas,

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[18] 10 Wheat. 1, 42 (U. S. 1825).
[19] *Id.* at 43.
[20] 192 U. S. 470 (1904), cited with approval in Currin v. Wallace, 59 Sup. Ct. 379 (1939).
[21] 29 STAT. 604 (1897), 21 U. S. C. A. § 41 (1934).

or merchandise described as tea, of inferior purity, quality and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof." The contention was made that this act conferred authority to establish standards and that such power is legislative and cannot constitutionally be delegated by Congress to administrative officers. The Supreme Court, in passing upon this question, accepted the construction placed upon the statute by the Court of Appeals for the Second Circuit, which court had held[22] that the Act, in view of the circumstances that led to its enactment, evinced the intention of Congress "to authorize the adoption of uniform standards by the Secretary of the Treasury which would be adequate to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably or possibly so because of their inferior quality." "This," said the Supreme Court[23] "in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the Statute." Therefore, "the claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit." The case was within the principle of *Field v. Clark*[24] for the court said:[25]

"We may say of the legislation in this case, as was said of the legislation considered in *Field v. Clark,* that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted."

In *United States v. Grimaud,*[26] the court again recognized that Congress cannot delegate legislative power, but pointed out that authority to make administrative rules is not a delegation of legislative power, and that such rules are not raised from an adminis-

[22]Buttfield v. Bidwell, 96 Fed. 328 (C. C. A. 2d, 1899).
[23]192 U. S. 470, 496 (1904).
[24]143 U. S. 649 (1891).
[25]192 U. S. 470, 496 (1904).
[26]220 U. S. 506 (1911).

trative to a legislative character because the violation thereof is punished as a public offense. In that case the defendants were indicted for grazing sheep on the Sierra Forest Reserve without having obtained the permission required by the regulations adopted by the Secretary of Agriculture. A demurrer to the indictment raised the question of the constitutionality of the Forest Reserve Act of 1897[27] in so far as it delegated to the Secretry of Agriculture the power to make rules and regulations. The court observed[28] that the various acts relating to the establishment and management of forest reservations were intended, among other things, "to improve and protect the forests." Therefore, the provisions of the statute that the Secretary "may make such rules and regulations and establish such service as will insure the objects of such reservation, namely to regulate their occupancy and use and to preserve the forests thereon from destruction," was not void as an attempt to delegate legislative power. Rather, it merely conferred administrative functions upon the Secretary, who was to exercise them with due regard to the primary standard laid down by Congress. This would require the Secretary, in promulgating rules and regulations, to effectuate the policy of Congress, which was to preserve and protect the forests. In the words of the court:

"When Congress had legislated and indicated its will, it could give to those who were to act under such general provisions, 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done."[29]

The same principle was followed in *Interstate Commerce Commission v. Illinois Central R. R.*[30] where the act in question made it unlawful to charge unreasonable rates or to discriminate between shippers, and the Interstate Commerce Commission had been given authority to make reasonable rates and to administer the law against discrimination.

In accordance with the power of the legislature to enact laws the effect and operation of which are made dependent on the happening of certain contingencies, it has been held that a general rule

[27] 30 STAT. 36 (1897), 16 U. S. C. A. § 478 (1934).
[28] 220 U. S. 506, 515 (1911).
[29] *Id.* at 517.
[30] 215 U. S. 452 (1910). The aforementioned essentials have been stated in numerous other cases. See Selective Draft Cases, 245 U. S. 336 (1917); Hampton v. United States, 276 U. S. 394 (1932); United States v. Shreveport Grain and Elevator Co., 287 U. S. 77 (1932).

or prohibition may be laid down and power vested in an executive officer or administrative board to determine whether particular cases do or do not fall within such rule or prohibition.[31] Such powers are conferred upon the Interstate Commerce Commission, Federal Trade Commission, and National Labor Relations Board. The exercise of such powers approaches the judicial as well as the legislative function, but does not offend the rule that neither legislative nor judicial powers may be exercised. In sustaining the validity of the Federal Trade Commission Act in *Sears, Roebuck & Co. v. Federal Trade Commission,* the court said:[32]

"With the increasing complexity of human activities many situations arise where governmental control can be secured only by the 'board' or 'commission' form of legislation. In such instances Congress declares the public policy, fixes the general principles that are to control, and charges an administrative body with the duty of ascertaining within particular fields from time to time the facts which bring into play the principles established by Congress. Though the action of the Commission in finding the facts and declaring them to be specific offenses of the character embraced within the general definition by Congress may be deemed to be quasilegislative, it is so only in the sense that it converts the actual legislation from a static into a dynamic condition. But the converter is not the electricity, and though the action of the Commission in ordering desistance may be called quasijudicial on account of its form, with respect to power it is not judicial, because a judicial determination is only that which is embodied in a judgment or decree of court and enforceable by execution or other writ of court."

Under and pursuant to the principles established in the preceding cases, Congress has continually exercised the right to delegate powers to executive departments and administrative tribunals, and not until 1935 was an Act of Congress successfully attacked on the ground that it constituted an unlawful delegation of legislative powers. In the *Panama Refining Co. v. Ryan,*[33] the plaintiff sued to enjoin the enforcement of certain regulations relating to the oil industry which were prescribed by the President under Sec-

[31]Monogahela Bridge Co. v. United States, 216 U. S. 177 (1910); Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194 (1911); Louisville Bridge Co. v. United States, 242 U. S. 409 (1917); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937); Sears Roebuck & Co. v. Federal Trade Commission, 258 Fed. 307 (C. C. A. 7th, 1919); Federal Trade Commission v. McLean & Son, 84 F. (2d) 910 (C. C. A. 7th, 1936), *cert. denied,* 299 U. S. 590 (1936).

[32]258 Fed. 307, 312 (C. C. A. 7th, 1919).

[33]293 U. S. 388 (1934).

tion 9 (c) of the National Industrial Recovery Act of June 16, 1933.[34] That section provided that "The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. . . ." Of that section the Supreme Court declared:[35]

"Section 9 (c) does not state whether, or in what circumstances or under what conditions, the President is to prohibit the transportation of the amount of petroleum products produced in excess of the State's permission. It established no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in Section 9 (c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit."

The case certainly warrants the conclusion that, under our Constitution, Congress cannot surrender its final control of policy, for the court said:[36]

"The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions. . . . The Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its functions in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply." For "Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many instances calling for its exertion would be but a futility."[37] "But," the court warns, "the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority

[34]48 STAT. 195, 200 (1933), 15 U. S. C. 701-712 (1934).
[35]293 U. S. 388, 415 (1934).
[36]*Id.* at 421.
[37]*Ibid.*

which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."[38]

In *Schechter Poultry Corporation v. United States*[39] the court invalidated the grant to the President to determine what constituted "Codes of Fair Competition," which, under section 3 of the National Industrial Recovery Act,[40] were to become law upon his approval. The court said:[41]

"We look to the statute to see whether Congress has overstepped these limitations,—whether Congress in authorizing 'Codes of Fair Competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or by the failure to enact such standards, has attempted to transfer that function to others."

Examination of the statute revealed to the court that Section 3 of the Recovery Act was without precedent, for the court said:[42]

"It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

Having thus established in a series of cases that the requisites of a valid delegation are that Congress must itself have the power to regulate; must define the subject to be regulated; must declare a policy with respect to the subject to be regulated and supply

[38] *Ibid.*
[39] 295 U. S. 495 (1935).
[40] 48 STAT. 195, 200 (1933), 15 U. S. C. 701-712 (1934).
[41] 295 U. S. 495, 530 (1934).
[42] *Id.* at 541, 542.

standards whereby discretion must be governed, it remained for the court to determine in *Carter v. Carter Coal Co.*[43] that a delegation of power to private groups—

"Is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business . . . The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question."

Thus was established as a rule of Constitutional Law that delegations, within permissible limits, should be made only to public officials, that is, to an officer or agency that acts in the name of the whole.

Having determined the limitations upon the power to delegate, attention will now be turned to the nature of the powers delegated, or perhaps more accurately, to the character of the functions performed by administrative officers pursuant to the statute which confers the authority to act. In the performance of the power conferred by statute, the process of administration assumes the form of administrative legislation or administrative adjudication, or perhaps both. Thus, in speaking of the powers conferred by Congress upon the Interstate Commerce Commission, the Supreme Court in *United States v. Baltimore & Ohio Ry.* said:[44] "Upon the Commission were conferred, besides some strictly administrative powers, both quasilegislative and quasijudicial functions." The words "legislative" and "judicial" have been softened by the prefix "quasi" in recognition of the well established rule that strictly legislative or judicial power cannot be delegated.

Administrative legislation is the making of a new rule to be applied in the future,[45] and is of various types. A classification along functional lines has been suggested:[46]

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[43]298 U. S. 238, 311 (1936). But Congress may enact a law and place a restriction upon its own regulation by withholding its operation "unless two-thirds of the growers voting favor it." That procedure is not an attempt to transfer to others the essential legislative functions with which Congress is vested by the Constitution. See Currin v. Wallace, 59 Sup. Ct. 379 (1939).

[44]293 U. S. 454 (1935).

[45]American Telephone and Telegraph Co. v. United States, 14 F. Supp. 121, 124 (1936), *aff'd.* 299 U. S. 232 (1936).

[46]MAURER, CASES AND MATERIALS ON ADMINISTRATIVE LAW (1937) 99.

"1. For purposes of amplification or implementation of statutes—administrative rules and regulations to adapt statutes to particular cases or situations, i.e., 'filling in the details.' These include all pronouncements, or orders, which lay down rules of conduct for future guidance, e.g., rate making, police regulations, tax regulations.

"2. For purposes of interpretation—administrative rules interpretative of the statute. These are necessary for the guidance of those in the administrative organizations who execute the law, and important also to the public, indicating the basis upon which administrative action may be anticipated.

"3. For purposes of execution—procedural rules for the enforcement of the statute. These are the due process of procedural law applicable to particular cases. . . .

"4. Pursuant to general or special powers delegated to executive heads, or administrative bureaus or boards, executive regulations pertaining to the internal organization of administrative departments, such as business practice procedures, and the distribution and assignment of administrative duties."

Quasijudicial power has been defined[47] "as the power to perform acts administrative in character, but requiring incidentally the trial and determination of questions of law and fact." It has been judicially declared that a procedure "requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence, it is frequently described as a proceeding of a quasijudicial character."[48]

Thus, the distinction between legislation and adjudication seems to be "that the former affects the rights of individuals in the abstract and must be applied in a future proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity."[49]

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[47]Pillsbury, *Administrative Tribunals* (1923) 36 HARV. L. REV. 405, 420.
[48]Hughes, C. J., in Morgan v. United States, 298 U. S. 468, 480 (1936).
[49]DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 21. It is recognized that the terms "judicial functions" and "adjudication" have no accepted meaning and that it is almost impossible to segregate the various functions of administrative or executive agencies into well-defined categories. See BLANCHLY & OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION (1934); Brown, *Administrative Commissions and the Judicial Power* (1935) 19 MINN. L. REV. 261, 265-275; Cooper, *The Proposed United States Admin-*

While the fixing of rates is a legislative function[50] which requires the prescribing of standards to which the administrative body must conform, the legislature usually requires as a condition precedent to the fixing of rates, a determination that existing rates are or will be, unjust, unreasonable, or discriminatory. Consequently, it is held that the duty carries with it fundamental procedural requirements. There must be a full hearing, which requires the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings. Thus, the proceeding has a quality resembling that of a judicial proceeding; therefore is characterized as a proceeding of a quasijudicial character.[51]

There are other types of administrative proceedings which lead to the issuance of decrees directed to individuals, the effect of which will be to affect their liberty of action or their property rights. Thus the judicial field is more nearly approached, inasmuch as these proceedings involve matters which would ordinarily be appropriate to submit to the courts. In *Murray's Lessee v. Hoboken Land & Implement Co.*,[52] the court, after pointing out that Congress could not withdraw from judicial cognizance any matter which, from its very nature, is a subject of suit at common law, in equity, or in admiralty, said:[53] "At the same time there are matters involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the United States, as it may deem proper."

Numerous statutes have been enacted conferring power upon executive officials, or administrative agencies, to issue orders which have the force of law, and which directly affect the liberty or property of others. These acts have been passed with due regard for constitutional requirements of due process, hence provide for hearings as conditions precedent to the valid exercise of the power conferred. It is well established that due process of law requires a hearing when the exercise of an adjudicative function is involved, and that the hearing must be as extensive as may be required for

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istrative Court (1937) 35 MICH. L. REV. 565; Green, *Separation of Governmental Powers* (1920) 29 YALE L. J. 369; *Report of the Special Committee on Administrative Law* (1920) 61 A. B. A. REP. 721.

[50]Louisville and Nashville R. R. v. Garrett, 231 U. S. 298 (1913).

[51]Morgan v. United States, 298 U. S. 468 (1936).

[52]18 How. 272 (U. S. 1855).

[53]*Id.* at 284.

the issues to be adjudicated.[54] "It is a rule founded on the first principles of natural justice older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property without an opportunity to be heard in defense of his rights."[55] Furthermore "due process of law is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative, or executive in its nature,"[56] and "in the comparatively few cases in which such question has arisen it has been distinctly recognized that administrative orders, quasijudicial in character, are void if a hearing was denied."[57]

Congress, in the Federal Trade Commission Act,[58] after providing that unfair methods of competition in commerce are unlawful, conferred upon the Federal Trade Commission, power to prevent the using of unfair methods of competition, by issuing an order to cease and desist from using such methods. The Act provides[59] specifically for notice and hearings as a preliminary to the issuance of such order.

The Interstate Commerce Act, Title 49, U. S. C. A., provides[60] that all charges shall be just and reasonable, and every unjust and unreasonable charge is prohibited and declared to be unlawful, and the Commission is empowered, after full hearing, to determine and prescribe what will be the just and reasonable charge.

Congress, in the National Labor Relations Act,[61] declared certain labor practices by an employer to be unlawful, and empowered the National Labor Relations Board to prevent any person from engaging in any unfair labor practice affecting interstate commerce, by issuing a cease and desist order, after due notice and hearing, and a finding that the employer was engaged in an illegal practice.

With respect to the necessity for hearings or findings, as a prerequisite to administrative legislation, the rule is not so well settled. Of course, the legislature may provide for hearings or findings as

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[54]Interstate Commerce Commission v. Louisville and Nashville R. R., 227 U. S. 88 (1913); Southern Ry. v. Virginia, 290 U. S. 190 (1933); MOTT, DUE PROCESS OF LAW (1926) 226.

[55]Stuart v. Palmer, 74 N. Y. 183, 190 (1878).

[56]*Id.* at 190, 191.

[57]Lamar, J., in Interstate Commerce Commission v. Louisville and Nashville R. R., 227 U. S. 88, 91 (1913).

[58]38 STAT. 717 (1914), 15 U. S. C. A. § 41 (1934).

[59]§ 5.

[60]§§1, 3, 15.

[61]49 STAT. 449 (1935), 29 U. S. C. A. § 151 (Supp. 1939).

conditions precedent to rule making, in which case it is apparent that a rule enacted without granting a hearing, or making a finding, would be *ultra vires* and void. Where hearings or findings have not been specifically required by statute, it might be reasonable to assume from a constitutional viewpoint, that the limitations governing legislatures in the exercise of the law-making function, would apply to administrative agencies in exercising legislative functions. Therefore, since it has never been held that an act of a legislature is void because a hearing was not granted prior to the enactment, it would appear that, unless expressly required by statute, neither hearings nor findings, are required as conditions precedent to the valid exercise of the delegated power. Nevertheless, the Supreme Court in *Panama Refining Co. v. Ryan*[62] has indicated that a finding is necessary, although the sections of the National Industrial Recovery Act involved in the case, and which empowered the President to prohibit the transportation in interstate commerce of petroleum in excess of an amount fixed by state law, did not provide that any express finding of fact be a condition precedent to the valid exercise of this power.

As a result of the freely exercised power to delegate within the limits previously discussed, procedural problems of great importance have arisen. In dealing with the legal aspects of administrative hearings and findings, it is necessary to turn attention to at least three procedural problems:

(1) Under what circumstances are hearings and findings necessary to validate administrative legislation?

(2) What are the requisites of hearings or findings when required as conditions precedent to the valid exercise of the legislative power conferred?

(3) What are the requisites of hearings and findings in administrative adjudication?

Administrative Legislation

Reference has already been made to the fact that powers delegated by Congress to an exectuive or a commission have been classified as quasilegislative or quasijudicial; the former involves the making of a new rule to be applied in the future, the latter involves a procedure "requiring the taking and weighing of evidence, determinations of fact based upon the consideration of evidence, and the making of an order supported by such findings."[63] The question now

[62]293 U. S. 388 (1934).
[63]Morgan v. United States, 298 U. S. 468 (1936).

arises as to the necessity of granting hearings or of making findings as conditions precedent to a valid exercise of the power conferred. In this chapter the problem will be discusssed with respect to administrative legislation.

The cases previously considered show that the only requirements laid down by the courts in permitting the delegation of power to make rules and regulations having the force of law, are that the legislative body clearly define its policy, and set forth a standard to guide and limit action under such delegation.[64] In no case did the court suggest that Congress should have required hearings or findings as a requisite of a valid delegation of the rule-making function, or that the one to whom the power was delegated should have afforded a hearing or made a finding showing that the rule promulgated complied with the legislative standard.

The power to issue regulations is a legislative power, and it has never been held that an act of the legislature is rendered invalid by failure to hold hearings. No one has a right to be heard by a committee of Congress when that committee is considering proposed legislation. "The constitutional right of petition to Congress has nothing whatever to do with the claim to be heard in argument before a committee. It is a matter of discretion with a committee as to the mode in which it will seek information concerning subjects referred to its consideration."[65] Hence the conclusion that due process does not require hearings or findings as the basis for valid action by the legislature. Since a general regulation by the legislature does not require advance notice and hearing, the fact that the legislature delegates this power to an administrative officer does not change the rule. Consequently, when quasilegislative power is exercised by an administrative agency, there is no constitutional right of advance notice and hearing.[66]

The conclusion is reasonable, not only because no adversary proceeding is involved, but also because, "Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly

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[64]COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES (1927) at p. 134 suggests another, *i. e.*, delegated legislation must bear a reasonable relation to the purpose of the law.

[65]LUCE, LEGISLATIVE PROCEDURE (1922) 143, 144.

[66]MOTT, DUE PROCESS OF LAW (1926) 229; Black, *Is the Test of the Reasonableness of an Administrative Determination Subjective or Objective?* (1935) 12 N. Y. U. L. Q. REV. 601, 607.

of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule . . . There must be a limit to individual argument in such matters if government is to go on."[67]

A more difficult question is whether Congress, in delegating regulatory authority to an executive or administrative official or board, must make the exercise of such authority dependent upon some finding of fact which must appear in the executive or administrative regulation.

In the past, most administrative agencies issued regulations not only without notice and hearing, but also without making findings of fact which would show that the regulation was within the scope of the authority delegated. The Supreme Court had always recognized the distinction between a regulation in the nature of general legislation, and an administrative order in the nature of a judgment directed against an individual concern. In the former, the legislative process is involved; in the latter, the judicial process.

In *Pacific States Box & Basket Company v. White*,[68] an Oregon statute authorized the chief of the Division of Plant Industry of the Department of Agriculture to fix and promulgate "official stanards for containers of horticultural products . . . in order to promote, protect, further and develop the horticultural interests of the state." Acting under this statute, the Chief of the Division promulgated a rule prescribing the size and specifications of the container to be used thereafter in marketing strawberries and raspberries, but made no findings of fact to show that the legislative standard had been complied with. The plaintiff manufactured a different type of container than that specified, so the effect of the new rule was to prevent further sales by it. The validity of the rule was attacked in a suit brought in the Federal Court seeking an injunction against the enforcement of the rule, on the ground that it deprived the plaintiff of rights guaranteed under the due process clause of the Federal Constitution, and on the further ground that the order was void because the administrative body made no findings of fact. On the latter point, Mr. Justice Brandeis, delivering the opinion of the

[67]Mr. Justice Holmes in Bi-Metallic Investment Co. v. State Board of Equalization of Colo., 239 U. S. 441, 445 (1915).

[68]296 U. S. 176 (1935).

court, said:[69] "But the statute did not require special findings; doubtless because the regulation authorized was general legislation, not an administrative order in the nature of a judgment directed against an individual concern. Compare *Wichita Railroad & Light Co. v. Public Utilities Comm.*, 260 U. S. 48, 58-59; *Mahler v. Eby*, 264 U. S. 32, 44; *Southern Ry. Co. v. Virginia*, 290 U. S. 190, 193, 194."

In the first case referred to by the court the Public Utility Law of Kansas[70] was involved. It created a commission and made full provisions for its procedure and powers. Section 13 of the Act provided that: "It shall be the duty of the Commission, either upon complaint or upon its own initiative, to investigate all rates, . . . fares . . . and if after full hearing and investigation the commission shall find that such rates . . . are unjust, unreasonable, unjustly discriminatory or unduly preferential, the commission shall have power to fix and order substituted therefor such rate or rates . . . shall be just and reasonable. . . ."

Of this section the court said:[71]

"The power (to fix and order substituted new rates for existing rates) is expressly made to depend on the condition that after full hearing and investigation the commission shall find existing rates to be unjust, unreasonable, unjustly discriminatory or unduly preferential. We conclude that a valid order of the Commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that for lack of such a finding, the order in this case was void."

The *Wichita Railroad & Light Co.* case,[72] in which findings were held necessary, therefore, as pointed out by the learned justice, may be distinguished from the *Pacific States Box and Basket Company* case on two grounds; first on the ground that in the former, a statute, as interpreted, required a finding to appear in the order, and secondly, the regulation involved was not general legislation, but an order in the nature of a judgment, directed against an individual concern.

The second case cited by the court, *Mahler v. Eby*,[73] involved an appeal from a judgment of the District Court of the United States for Northern Illinois, dismissing five writs of *habeas corpus*, and

[69] *Id.* at 186.
[70] Ore. Laws 1933 c. 238.
[71] 260 U. S. 48, 58 (1922).
[72] 260 U. S. 48 (1922).
[73] 264 U. S. 32 (1924).

remanding the appellants, who were aliens, to the custody of the Immigration Inspector at Chicago for deportation, in pursuance to warrants issued by the Secretary of Labor. The statute involved was an Act of Congress[74] providing that aliens of certain described classes, in addition to those for whose expulsion authority already existed, shall, upon the warrant of the Secretary of Labor, be taken into his custody and deported in the manner provided in Sections 19 and 20 of the Immigration Act of February 5, 1917,[75] "if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States." The validity of the warrants of deportation was attacked on the ground that they did not show a finding that the appellants were undesirable residents of the United States. As to the necessity of such finding, the court said:[76]

"The finding is made a condition precedent to deportation by the statute. It is essential that, where an executive is exercising delegated legislative power, he should substantially comply with all the statutory requirements in its exercise and that, if his making a finding is a condition precedent to this act, the fulfillment of that condition should appear in the record of the act."

Again, the conclusion would seem to be warranted that findings of fact by the administrative agency are necessary only when the statute requires findings, and when the regulation is not a general one, but an order issued to an individual, affecting his liberty or property rights.

There remains to be considered the third case to which the court invites comparison. In *Southern Railway Company v. Commonwealth of Virginia,* the constitutionality of an act[77] of the General Assembly of Virginia was challenged on the ground that enforcement of the Act as construed by the State Supreme Court, would deprive appellant of property without due process of law, in violation of the Fourteenth Amendment. Relative to the act and the construction placed upon it by the State Supreme Court, Mr. Justice McReynolds speaking for a majority of the court said:[78]

"As authoritatively interpreted the challenged Act permits the Highway Commissioner—an executive officer—without notice or hearing to command a railway company to abolish any designated

[74]41 STAT. 593 (1920), 8 U. S. C. A. § 157 (1927).
[75]39 STAT. 889 (1917), 8 U. S. C. A. § 155 (1927).
[76]264 U. S. 32, 44 (1923).
[77]Va. Acts 1930, c. 62, VA. CODE ANN. (Michie, 1930) § 3974a.
[78]290 U. S. 190, 194 (1933).

grade crossing and construct an overhead when, in his opinion, necessary for public safety and convenience. His opinion is final upon the fundamental question whether public convenience and necessity require the elimination unless what the Supreme Court denominates arbitrary exercise of the granted power can be shown. Upon petition, filed within sixty days, the Corporation Commission may consider the proposed plans and approve them or modify them, but nothing more. The statute makes no provision for review by any court."

As thus construed, the statute was held to conflict with the Fourteenth Amendment; not because, it must be noted, hearings or findings are required in the absence of a statute to the contrary as conditions precedent to valid administrative rule making in the nature of general legislation, but because, as indicated by way of distinction in the *Pacific States Box and Basket Company* case, the regulation involved was in the nature of a judgment directed against an individual concern, the effect of which order would be to deprive the one to whom the order was directed, of its property. This can, of course, be done provided the requirement of due process is met. On this point, the court observes that:[79]

"If we assume that by proper legislation a state may impose upon railways the duty of eliminating grade crossings, when deemed necessary for public safety and convenience, the question here is whether the challenged statute meets the requirements of due process of law. Undoubtedly, it attempts to give an administrative officer power to make final determination in respect of facts—the character of a crossing and what is necessary for the public safety and convenience—without notice, without hearing, without evidence, and upon this *ex parte* finding, not subject to general review, to ordain that expenditures shall be made for erecting a new structure. The thing so authorized is no mere police regulation."

That the court recognized the judicial character of the function delegated is clear, for the court continues:[80]

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasijudicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.' "[81]

[79] *Id.* at 194, 195.
[80] *Id.* at 195.
[81] Quoting from Interstate Commerce Commission v. Louisville & Nashville R. R., 227 U. S. 88, 91 (1913).

Clearly then, in such cases, hearings, and of necessity, findings, are requisite, not merely because provided for by statute, but because of the due process requirement of the Fourteenth Amendment, since, as pointed out in the case under discussion, failure to provide for such, renders a statute void, when such statute attempts to give finality to the administrator's action. As the court observes,[82] the act in question "makes no provision for a hearing and grants no opportunity for a review in any court. This, we think, amounts to the delegation of purely arbitrary and unconstitutional power. . . ."

In determining the validity of administrative rules and regulations promulgated pursuant to a statute in which the legislative policy has been declared and in which standards have been established for guiding administrative discretion, it has not been the custom of the courts to inquire as to whether the legislature has conditioned the power delegated on either the granting of a hearing, or the making of a finding.[83] When the rule making or regulatory function has been exercised, and the validity of the administrative act has been questioned, the attention of the court has always been turned to the inquiry of whether the regulation in question comes within the power conferred by the statute under which the administrative agency has acted. "It is settled law that while an executive tribunal or official may constitutionally be empowered by Congress to make such regulations as are reasonably necessary to the proper execution of a statute, so long as such regulations are merely administrative in character, and relate only to the enforcement of the statute, yet such an executive tribunal or official cannot, constitutionally, either with or without the sanction of Congress, make any rule or regulation the effect of which would be to add to, take from, or otherwise change such statute, for that would be to permit the executive department to encroach upon and usurp the function of the legislative department, to which alone belongs the power to legislate."[84] The regulation, to be valid, must not only be consistent with the statute, but also it must be reasonable.[85]

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[82]290 U. S. 190, 197 (1933).

[83]United States v. Grimaud, 220 U. S. 506 (1911).

[84]*In re* Mellea, 5 F. (2d) 687, 689 (E. D. Mich. 1925).

[85]International R. R. v. Davidson, 257 U. S. 506, 514 (1922); American Tel. & Tel. Co. v. United States, 299 U. S. 232 (1936); *In re* Mellea, 5 F. (2d) 687 (E. D. Mich. 1925); MacMillan v. Railroad Comm. of Texas, 51 F. (2d) 400 (W. D. Tex. 1931); Watts v. United States, 82 F. (2d) 266 (C. C. A. 2d, 1936); see also: Black, *Is the Test of the Reasonableness of an Administrative Determination Subjective or Objective?* (1935) 12 N. Y. U. L. Q. Rev. 601, 607.

The conclusion expressed by the late Mr. Justice Cardozo to the effect that "If findings are necessary as a preamble to general regulations, the requirement must be looked for elsewhere than in the Constitution of the nation,"[86] seems to be fully justified by the cases decided prior to 1935, and apparently Congress has shared that view, because until recently[87] it was the exception rather than the rule, for Congress to provide, in an act delegating authority, for findings as a condition precedent to an exercise of the rule making function.

In the recent case of *Mallory Coal Co. v. National Bituminous Coal Commission*[88] Section 2 (a) of the Bituminous Coal Act was before the court. That section provided that "No order which is subject to judicial review under section 6 , *and no rule or regulation which has the force and effect of law,* shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless is has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact." (Italics added.) Of this section, Miller, Associate Justice of the United States Court of Appeals for the District Court of Columbia, speaking for the court, said:[89] "If the italicized language of Section 2 (a) was intended to have such sweeping effect,[90] it constitutes a striking departure from previous legislative requirements and an interesting anticipation of recent proposals to subject all such rules and regulations of administrative agencies to public hearings and opportunity for objection by interested persons."[91]

The doubt as to the necessity of a finding as to a condition precedent to the valid exercise of the rule making function, has been occa-

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[86]Dissenting opinion in Panama Refining Co. v. Ryan, 293 U. S. 388, 448 (1935).

[87]§ 2 a() of the Bituminous Coal Act, 50 STAT. 72 (1937), 15 U. S. C. A. § 828 (Supp. 1939), provides that "no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact." Similar provisions are found in other recent legislation. See § 5 (f) of the Federal Alcohol Administration Act, 49 STAT. 984 (1935), 27 U. S. C. A. § 204 (Supp. 1939); § 4 of the Trade Agreement Act, 48 STAT. 945 (1934), 19 U. S. C. A. § 1354 (1934); Fair Labor Standards Act of 1938, 52 STAT. 1060 (1938), 29 U. S. C. A. § 202 (Supp. 1939).

[88]99 F. (2d) 399 (App. D. C. 1938).

[89]*Id.* at 406.

[90]As to require notice and hearings before making procedural rules.

[91]Referring to the report of the *Special Committee on Administrative Law* (1937) 62 A. B. A. REP. 789, 790; *Administrative Law Recommendations, Some Issues Involved* (1938) 3 FED. B. A. J. 105; McGuire, *Judicial Review of Administrative Decisions* (1938) 26 GEORGETOWN L. J. 574, 601.

sioned by the Supreme Court's opinion in the widely discussed[92] case of *Panama Refining Co. v. Ryan.*[93] In that case, the Supreme Court, one Justice dissenting, held invalid Section 9 (c) of Title 1 of the National Industrial Recovery Act[94] on the ground that the attempted delegation was void because the power sought to be delegated is legislative power, and Congress had declared no policy and prescribed no standard to guide the President when acting under such delegation. Another objection to the validity of the order issued pursuant to the statute was that Congress had not required any finding by the President in the exercise of the authority delegated, and that the Executive Order issued contained no finding of fact nor statement of the grounds of the President's action. It is the latter objection with which we are here concerned, since it raises the question as to the necessity of requiring or making findings of fact as conditions precedent to the exercise of the power to issue administrative orders in the nature of general legislation.

Section 9 (c) provides: "The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this sub-section shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both." It is apparent that Congress has not expressly required any finding by the President as a condition precedent to the exercise of the power granted. It is equally apparent that the Executive Order issued contains no finding of fact. The text of the Order is as follows:

"EXECUTIVE ORDER

"Prohibition of Transportation in Interstate and Foreign Commerce of Petroleum and the products thereof unlawfully produced or withdrawn from storage.

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[92]Cousens, *Delegation of Federal Legislative Power to Executive Officials* (1935) 33 MICH. L. REV. 512; Ray & Wienke, *Hot Oil on Uncharted Seas of Delegated Powers* (1935) 29 ILL. L. REV. 1021; Notes (1935) 48 HARV. L. REV. 798, (1936) 49 HARV. L. REV. 827.

[93]293 U. S. 388 (1934).

[94]48 STAT. 195, 200 (1933), 15 U. S. C. § 701-712 (1934).

"By virtue of the authority vested in me by the Act of Congress entitled 'An act to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes; approved June 16, 1933 (Public No. 67, 73rd Congress), the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State, is hereby prohibited.

FRANKLIN D. ROOSEVELT"

"The White House,
July 11, 1933"

The cases cited by the court as decisive on the point that an administrative order is invalid if it does not contain an express finding of fact, are *Wichita Railroad Light Co. v. Public Utilities Commission*[95] and *Mahler v. Eby.*[96] But, the dissenting opinion points out,[97] the cases are not in point. The former dealt with a delegation to a public utilities commission of the power to reduce existing rates *if they were found to be unreasonable;* the latter a delegation to the Secretary of Labor of the power to deport aliens *found after notice and hearing to be undesirable residents.* These cases definitely established the proposition that if legislative power is delegated *subject to a condition,* it is a requirement of constitutional government that the condition be fulfilled.[98]

It is too much to believe that all of the justices, save one, could have been misled in finding that an analogy existed between power so conditioned and the power in controversy in the *Panama* case. It is to be remembered that another point in controversy was whether Congress had prescribed standards whereby discretion must be governed. The majority was unable to find, even by implication,

[95]260 U. S. 48 (1922).
[96]264 U. S. 32 (1924).
[97]293 U. S. 388, 447, 448 (1934).
[98]In Mahler v. Eby, 264 U. S. 32, 44 (1923), with reference to the ruling in the Wichita case, 260 U. S. 48 (1922), the court said: "We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government."

any standards. The dissenting justice, after pointing out that the prevailing opinion concedes that a standard will be as effective if imported into Section 9 (c) by reasonable implication, as if put there in express words, vigorously argued that standards could be found in Section 1 of the Act; this conclusion, the majority repudiated on the ground that the first section was merely a general outline of policy which contained nothing as to the circumstances or conditions in which transportation of petroleum or petroleum products should be prohibited, i.e., merely an introduction of the Act, leaving the legislative policy as to particular subjects to be declared and defined, if at all, by the subsequent sections.[99]

Section 1 of the Act provides: "A national emergency productive of wide-spread unemployment and disorganization of industry which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervisions, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

The dissenting Justice asserts that standards are to be found in that section in the phrases "to eliminate unfair competitive practices," "to conserve natural resources," "to promote the fullest possible utilization of the present productive capacity of industries," and "except as may be temporarily required" to "avoid undue restriction of production."[100] He concludes therefore that in substance Congress said to the President: "You are to consider whether the transportation of oil in excess of the statutory quotas is offensive to one or more of the policies enumerated in Section 1, whether the effect of such conduct is to promote unfair competition or to waste the natural resources, or to demoralize prices, or to increase unem-

[99]293 U. S. 388, 417 (1934).
[100]*Id.* at 436.

ployment, or to reduce the purchasing power of the workers of the nation. If these standards or some of them have been flouted with the result of a substantial obstruction to industrial recovery, you may then by a prohibitory order eradicate the mischief."[101]

It is to be noted that the Justice carefully avoided saying "*If you find* that these standards or some of them have been flouted, etc.," for such construction would require the conclusion that the power conferred was subject to the "implied" requirement that the finding appears in the regulatory order, and the cases cited by the majority would necessitate the conclusion that the order was void for lack of an express finding.[102]

The majority evidently felt the force of the argument for it observed:[103] "If it could be said that from the four corners of the statute any possible inference could be drawn of particular circumstances or conditions which were to govern the exercise of the authority conferred, the President could not validly act without having regard to those circumstances and conditions. And findings by him as to the existence of the required basis of his action would be necessary to sustain that action, for otherwise the case would still be one of an unfettered discretion as the qualification of authority would be ineffectual."

If then, standards are to be found in the phrases suggested in the dissenting opinion, the majority concludes that the order is invalid because of lack of an express finding. The question now arises as to whether the requirement of findings has a purely statutory, or constitutional basis. Perhaps the majority assumes, for the purpose of argument, that standards are to be imported into Section 9 (c) by reasonable implication, and that in placing such limitations on the power to regulate, Congress, in substance, said to the President: "You are to consider whether the transportation of oil in excess of the statutory quotas is offensive to one or more of the policies enumerated in Section 1. *If you find* that these standards or some of them have been flouted you may then by a prohibitory order eradicate the mischief." Findings would then be necessary, because the act, as construed, requires findings. The order then would be invalid, because the President had not complied with the statute.

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[101] *Id.* at 437.

[102] Unless the rule applicable to administrative agencies is not applicable to executive officials—another point on which the court divided.

[103] 293 U. S. 388, 431 (1934).

If, however, the court is unable to read into the act an implied requirement that a finding be expressed in the order, then the question arises as to whether a statute is valid if it confers authority to promulgate a regulation when any one of several conditions exits, but does not require an express finding to the effect that one of the designated conditions does exist. Perhaps this is the issue, as the majority actually saw it, since, although the majority was willing to assume for purposes of argument that standards were implicit in the act, there was no expression of willingness to concede an implied requirement that an express finding be made. On that assumption, the "hot oil" clause of the statute is analogous to contingent legislation, but Congress had not required the President to recite the existence of any of the designated circumstances, and the statute is invalid, as an attempt to confer an unfettered discretionary power.

With the limitation imposed by the *Panama* case, the conclusion is that findings are not required, in the absence of a statute to the contrary, as conditions precedent to the valid exercise of the delegated power to promulgate rules and regulations in the nature of general legislation, unless the power to issue regulatory orders is made to depend upon the existence of at least one of several enumerated conditions, in which case a finding as to the existence of the condition must expressly appear in this order. Otherwise, as suggested by the majority in the *Panama* case, the conditions would be inoperative, and an uncontrolled legislative power would be delegated contrary to well established constitutional principles.

This conclusion finds support in *Pacific States Box and Basket Co. v. White*,[104] decided shortly after the *Panama* case. The legislative purpose with respect to the statute involved, was to facilitate trading, to preserve the condition of the merchandise, to protect buyers from deception, and to prevent unfair competition. The statute authorized administrative officers to fix and promulgate "official standards for containers for horticultural products" "in order to promote, protect, further and develop the horticultural interests." A rule prescribing the size and specifications of containers was promulgated and thereafter was attacked on the ground that no findings of fact had been made. In sustaining the validity of the rule the court said:[105] "It is contended that the order is void because the administrative body made no special findings of fact. But the statute did not require special findings; doubtless because the regulation author-

[104]296 U. S. 176 (1935).
[105]*Id.* at 186.

ized was general legislation, not an administrative order in the nature of a judgment against an individual concern."

Although special findings in the case of general regulations, as distinguished from particular judgments or determinations under contingent legislation, are not necessary, a particular statute may require them. When it is remembered that administrative tribunals, in this country, are statutory creations, it becomes apparent that their powers are of statutory derivation. The rule-making power cannot go higher than, nor beyond its source, which is a statute. Consequently, if the statute requires a finding preliminary to the exercise of the rule-making function, the promulgation of a rule without reciting the required finding would be beyond the power conferred by the legislative body and would be void.[106] Likewise, if the statute requires a hearing prior to the making of rules or regulations, the validity of the rule or regulation would depend upon the granting of the hearing.[107]

Admitting the necessity for hearings and findings when required by statute, the question arises, what are the requisites of hearings and findings preliminary to valid administrative legislation or rule-making.

Administrative Hearing Preliminary to Rule-Making Function.

In determining the nature of the hearing that must be afforded, when a hearing is provided for by statute, as a preliminary to the exercise of the rule-making function, it must be borne in mind that notice and hearing are not a requirement of due process of law in connection with the promulgation of general rules and regulations.[108] Obviously then, when a hearing is granted as a matter of grace, the type of hearing to which an interested party is entitled, depends upon legislative intent, rather than upon the requirements of the due process clause as established in cases involving the exercise of the judicial or quasijudicial function in adversary proceedings affecting rights of life, liberty, or property.

An inquiry into the reasons for providing for hearings may be helpful in determining the nature of the hearing to be granted. The rapid growth of the administrative process attended by the extensive exercise of the rule-making function has resulted in wide and varied

[106]United States v. B. & O. R. R., 293 U. S. 454 (1935).

[107]Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294 (1933).

[108]Bi-Metallic Investment Co. v. State Board of Equalization of Colo., 239 U. S. 441 (1915).

and occasionally bitter comment respecting the devolution of legislative functions to administrative agencies.[109] It has resulted in the promulgation of rules and regulations having the force of law, by administrative agencies, not composed of representatives chosen by the people as their agents for the enactment of laws. Having had no voice in the selection of such persons, experience has shown that those affected by such legislation are extremely reluctant to give allegiance to laws enacted by those popularly know as "bureaucrats." Since those who are affected by administrative rules and regulations have no part in the selection of the personnel of administrative agencies, the provisions for hearings may have been made by the legislative body in an attempt to forestall such adverse criticism by affording those who will be affected by administrative regulations an opportunity to be heard in advance of the adoption of specific regulations, and thus, perhaps, induce the feeling that such parties have had a personal, though remote, share in the framing of the laws regulating their conduct. Even though the rules subsequently adopted may not be favorable to all of those who were present at the hearing, there may be some satifaction in merely having had the opportunity to present their side of the case.

Hearings give publicity to the rule-making process. A hearing permits the public to know in advance of proposed legislation, and unfavorable public reaction must certainly have its effect upon those endowed with authority to enact regulations; if not a direct affect, certainly an indirect one, since administrative agencies are answerable to the legislative body, and the legislative body, directly to the people.

Perhaps the main purpose in affording opportunity to be heard is to make it possible for the administrative body to obtain facts, points of view of interested parties, and information in general, which otherwise it could not obtain. With such information, it could then proceed more intelligently to carry out its duties. Quite frequently Congress, preliminary to the enactment of legislation,

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[109]ALLEN, BUREAUCY TRIUMPHANT (1931); HEWART, THE NEW DESPOTISM (1929); *Report of the Special Committee on Administrative Law* (1920) 61 A. B. A. REP. 721.

"A *Times* leading article recently said: 'Parliament has developed a method of passing measures which contain merely bones and government departments are given the power to supply any sort of flesh that they may think suitable. . . . The delegation by Parliament of law-making to government departments. . . . now seems to have become an otiose habit. It has been seen more than once that where the legislature gives the executive an inch it is prone to take an ell . . .' " Sir Josiah Stamp, *Recent Tendencies Towards the Devolution of Legislative Functions to the Administration* (1924) 2 J. PUB. AD. 23.

provides for hearings before congressional committees. When Congress has made provisions for hearings before administrative agencies, the implication may therefore arise that the hearing is to be of the same nature as that held by a legislative committee in considering proposed legislation. At any rate, when a statute is enacted making provisions for a hearing, it becomes the function of the court to construe the statute, and thus to determine the type of the hearing intended by the legislature.

This problem was before the Supreme Court in *Norwegian Nitrogen Products Co. v. United States.*[110] The question involved was whether or not the action of the United States Tariff Commission under the flexible tariff provision of the Tariff Act of 1922[111] should be accompanied by a judicial type of notice and hearing. Under the Act, the President is given authority to increase or decrease the rates of duty specified in the Act, if he finds upon investigation that increase or decrease is necessary in order to equalize the difference in the cost of production in the United States and elsewhere. There shall be no proclamation under the authority of the statute until an investigation to assist the President has been made by the United States Tariff Commission and "the Commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard.[112]

The facts are that the American Nitrogen Products Company submitted to the Tariff Commission a request for a report and recommended to the President that the duty on sodium nitrate be increased 50 per cent. In response to the request, the Commission ordered that an investigation be made, declared that a public hearing would be held on a date thereafter to be fixed, and gave public notice of its order. The Commission then proceeded to the business of investigation. The American Nitrogen Products Company gave to the Commission information as to costs of production, the commission having promised not to reveal such information to competitors, since costs were, in effect, trade secrets. The Norwegian Company refused to supply the investigators with any statement of costs, but the Commission made an estimate of costs based upon information received from other sources. When this preliminary investigation was concluded, the Commission gave notice of a public hearing to

[110] 288 U. S. 294 (1933).
[111] 42 STAT. 858, 941-943 (1922), 19 U. S. C. § 121 (1928).
[112] 42 STAT. 858, 941 (1922), 19 U. S. C. § 121 (1928).

be conducted on a specified date. The interested parties duly appeared, and the Norwegian Company requested complete information as to the American Company's cost of production, and the right to cross-examine the experts of the Commission with respect to information collected by them. Both requests were refused, which resulted in the contention that the hearing required by statute had not been granted, therefore the proclamation of the President based upon the Commission's report was invalid.

With respect to such contention the Supreme Court, speaking through Mr. Justice Cardozo, said:[113] "The decision of this case hinges upon our answer to the question whether the petitioner has been 'heard' in accordance with the statute. Does the requirement of a hearing mean that every producer or importer affected by a tariff may explore at will the data collected by the commission as to the capital, the wages, the cost of material and manufacture, in the business of any other person similarly affected, and may cross-examine investigators and competitor's upon the data thus laid bare? If something less than this is exacted, is there still a minimum of disclosure without which the purpose of the hearing will be thwarted altogether, and was this minimum attained by what was done by the Commission here?"

For the answer to these questions, the court turned to history, analogy and administrative practice. After pointing out that the process of tariff-making by Congress and congressional committees is not different in essentials from that for legislation generally, it is observed that although it has been the practice to give a hearing to those affected by the proposed legislation, the validity of the legislation would not be affected although no hearing was granted. But when a hearing was granted, it was not similar to a trial as conducted in a court. It was not the custom to permit the advocates of a measure to cross-examine the opponents, nor the opponents the advocates, nor to compel the committee itself to submit to interrogation as to data collected by its members through independent investigation. The hearing is granted for the purpose of securing information which may assist those charged with the responsibility of enacting laws. The inference is, therefore, that the kind of hearing assured by the statute, is a hearing of the same order as has been given by congressional committees when the legislative process is in the hands of Congress. "Nothing in the statute, suggests a belief of the lawmakers that every producer or importer

[113]288 U. S. 294, 303 (1933).

is to be viewed, like a party to a law suit, as the adversary of every other, with the privilege of examination and cross-examination extended through the series."[114] In other words, the court is making a distinction between investigation preliminary to the formation of a rule, and investigation resulting in an order directed against a particular individual or firm after notice and hearing. In the latter case, the judicial process rather than the legislative process is involved.

Significant also is the court's reference to the fact that the type of hearing which must be given depends not only upon the consequences which are to follow, but also upon the attack and review to which the resulting acts will be subject. If the order is subject to judicial review, as in the case of orders of the Interstate Commerce Commission relative to rates, the statute providing for a hearing preliminary to the order resulting in a change of rates is "instinct with the recognition of a duty to give a hearing of such a kind that the courts will understand why a commission has acted as it has if their supervisory powers are afterwards invoked for enforcement or revision."[115] The court draws no such inference in the act under consideration, in view of the fact "neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed."[116] No one has the legal right to the maintenance of an existing rate or duty, but a public service corporation has the constitutional right to a reasonable return on its investment, consequently an order of a public service commission may be attacked, if the effect is to reduce the charges to the point of confiscation.

If then, the nature of a hearing preliminary to enactment of rules and regulation, is the same as that held by a legislative committee in considering proposed legislation, the question arises as to the parties entitled to be heard. Usually the statute providing for hearing is not specific on the point. In the *Nitrogen Products Company* case[117] the statute provided that "The commission shall give

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[114] *Id.* at 308.
[115] *Id.* at 319.
[116] *Id.* at 318. In Union Fork & Hoe Co. v. United States, 86 F. (2d) 423 (C. C. P. A. 1936), it was held that where notice and hearing are given, the courts will not review the Tariff Commission's report and findings to determine whether they are correct or whether the investigation was comprehensive enough to make a proper showing of differences of cost of production at home and abroad, the Commission's report indicating that it examined typical facts widely and fairly.
[117] 288 U. S. 294 (1933).

reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard." In that case it appeared that there were four companies, two domestic and two foreign, who were the chief producers of sodium nitrate, all of whom were interested parties, and were given the opportunity to be heard. When only a few parties have a real interest in proposed legislation, it is possible to afford each an opportunity to present his views and evidence to support them. But there are others who are also interested in the proposed increase of duties on imported products, namely, the consumers who, of course, must pay the increased price for imported products, or as an alternative, buy the domestic product. Are consumers interested parties to the extent that they would be entitled to be heard under a statute such as the one under discussion? If so, the hearing would be apt to become rather unwieldly, and the amount of time that would be required to afford "consumers" an opportunity to be heard, would be so great as to make it impractical, if not impossible, to permit more than a few of such parties to be heard. Otherwise the hearings might be drawn out over a period of years, thus defeating entirely the purpose of Congress in delegating the authority to increase rates to the President.[118]

The difficulty would probably be avoided by construing the statute so as to permit only those "primarily" interested to be heard. Such a construction would therefore entitle only the domestic and foreign producers to a hearing, since obviously, tariff rates are imposed not for the benefit of the domestic consumer, but for the benefit of domestic companies engaged in competition with foreign companies, whose costs of production may be less.

Assuming, however, that consumers would be included in the category of "interested" parties, it would not necessarily follow that great numbers would be entitled to be heard, for usually an express or implied provision may be found in the statute which will justify a limitation on the number entitled to present their views. In the *Nitrogen Products* case, the statute involved authorized the Tariff Commission to adopt such reasonable procedure, rules and regulations as it may deem necessary; certainly under such a grant of

[118]Delegation of similar powers to an executive officer or an administrative tribunal is sometimes justified on the ground that circumstances may arise which necessitate action at a time when Congress is not in session. Therefore Congress declares its will, sets up primary standards, and devolves upon administrative officials the power to enact rules and regulations to correct the anticipated evils.

authority, a regulation limiting the number of persons and the time to be given over to hearings would be reasonable. Even when a hearing is given by congressional committees, the extent of the hearing and the number to be heard is discretionary. If a hearing preliminary to administrative rule-making is analogous to a hearing given by congressional committees, it would appear that if the Congressional intent was to give even those secondarily interested a right to a hearing, that intent would be expressed in more suitable terminology. In the final analysis, it is the legislative intent that must be ascertained, and a construction which will effectuate rather than defeat the purpose of the statute is to be preferred.

Another problem arising as a result of the recent trend[119] toward requiring hearings preliminary to the exercise of delegated power to enact rules and regulations, is presented by the Bituminous Coal Act.[120] Section 2 (a) provides that ". . . no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact. Does such a statute mean that a hearing must be given preliminary to the promulgation of *procedural* rules and regulations, as well as rules and regulations in the nature of *general* legislation? If so, then a hearing must be granted preliminary to the promulgation of rules of practice, pleading, procedure and evidence. The statute, on its face would seem to establish such requirement, for it applies to rules or regulations which have "the force and effect of law," and it is well established that rules of practice, pleading, procedure and evidence, promulgated under proper legal authorization, by an administrative agency, have the force and effect of law.[121]

If the statute is to be construed as including "procedural" rules and regulations, it is difficult to ascertain the utility of a hearing in such a case. In the first place, the average person who will be affected by subsequently enacted legislation, has no knowledge in regard to rules of practice, pleading, procedure and evidence. Consequently an administrative body would derive no beneficial information from those affected by the statute. In the second place, such procedure would entail great expense and delay without producing

[119]See note 87 *supra.*
[120]See note 87 *supra.*
[121]United States v. Birdsall, 233 U. S. 223 (1914); United States v. Moorhead, 243 U. S. 607 (1917); Maryland Casualty Co. v. United States, 251 U. S. 342 (1920).

any tangible benefit. Finally, the granting of a hearing preliminary to the promulgation of procedural rules is so contrary to established administrative practices sanctioned by the courts, as to justify a doubt as to the legislative intent to require such procedure.

The question was raised, but not decided in the recent case of *Mallory Coal Co. v. National Bituminous Coal Commission.* The court said:[122] "If the italicized language of Section 2 (a) (no rule or regulation which has the force and effect of law) was intended to have such sweeping effect, it constitutes a striking departure from previous legislative requirements and an interesting anticipation of recent proposals to subject all such rules and regulations of administrative agencies to public hearing and opportunity for objection by interested persons." Then, after pointing out that it was not necessary to consider the question, it was said in a footnote:[123] "It may well be argued that to adopt such a construction would hinder the efficient enforcement of the Act and lead to absurd results in the light of settled administrative practices. An established rule of statutory construction enjoins courts from attributing to the legislature a construction which leads to absurd results . . . Consequently, perhaps the National Bituminous Coal Act should be so construed as to permit the commission to make procedural and evidential rules summarily, and to limit the requirement of a public hearing to the adoption of rules of a different character, such as those governing the marketing of coal." Here, at least, is a realistic approach to the question. What was the intent of Congress?

Requisites of Findings Preliminary to Exercise of Rule-Making Function

Where the power of an executive officer, board, or commission to issue orders in the nature of general legislation depends on determinations of fact, those determinations must be shown even though, according to the doctrine of the *Panama* case, the statute conferring the authority has made no provision for judicial review. The practical effect of the decision is yet to be determined. It may be that nothing will be accomplished by the requirement other than to add a formality to the issuance of the legislative order, which would involve only a recital of the subjective opinion of the executive officer, board or commission, in the terms of the statute, and

[122] 99 F. (2d) 399, 406 (App. D. C. 1938).
[123] *Ibid.* n. 8.

if so, the requirement is of little value. The effect of the decision would then "be much like that of the Statute of Uses which has been[124] merely to have added six more words to every English conveyance."

Where the power to issue general regulations depends on determinations of fact, and the order is by statute subject to judicial review, the order must contain a finding as to such fact. The finding has been described[125] as "basic" or "quasijurisdictional." In *United States v. B. & O. Co.*,[126] the court held an order of the Interstate Commerce Commission invalid because of failure to make the basic finding under an Act conferring authority to prescribe by rule specific devices, or changes in equipment, where these are required to remove "unnecessary peril to life or limb." The Commission issued a general order requiring steam locomotives to be equipped with power operated reverse gear instead of hand reverse gear. Numerous findings were made by the Commission, but it failed to specifically find that the use of locomotives equipped with hand reverse gear causes "unnecessary peril to life or limb", so the order was held to be invalid because of the complete absence of the "basic or essential findings required to support the Commission's order." The court seemingly required the finding to approximate the express language of the statute.[127] If, then, the basic finding in the language of the statute is sufficient when the order is subject to judicial review, it would appear reasonable to conclude that such a finding would be sufficient when the statute does not provide for judicial review, as in the *Panama* case. This conclusion also finds support in *Mahler v. Eby*,[128] one of the cases cited as supporting the view that the order in the *Panama* case was void because no finding was made, for the court, after pointing out that the statute conferred power upon the Secretary of Labor to deport aliens found, after notice and hearing, to be undesirable residents, held that the omission to state in the warrant of deportation that the Secretary found the alien to be an undesirable resident, invalidated the warrant.

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[124]Cousens, *Delegation of Federal Legislative Power to Executive Officials* (1935) 33 MICH. L. REV. 512, 543.

[125]United States v. B. & O. R. R., 293 U. S. 454 (1935).

[126]*Ibid.*

[127]It should be noted that where orders are subject to judicial review, it is necessary to make not only the "basic finding" but also findings of fact which will support the "basic finding". This is required in order to facilitate judicial review. This point will be discussed in the next installment of this article.

[128]264 U. S. 32 (1924).

Even though compliance be a mere formality, the rule requiring a finding under a statute conferring power to promulgate a general regulation if one of several contingencies be found to exist, imposes no particular hardship upon the administrative officer, and may be found to have some utility. While it is true that the Order of the President, had he made the requisite finding, and assuming the Act to be valid, would not have been subject to judicial review, upon certiorari or appeal, it does not follow that the order would be valid if it could be shown that in no conceivable aspect was there any fact which would support the finding that the designated contingency existed. Under such circumstances the order would not stand,[129] since it would be "an act of mere oppression, an arbitrary fiat that overleaps the bounds of judgment."[130]

The requirement, then, results in informing those affected by the regulatory order of the reason for the action, which would seem to be desirable in as much as it would simplify any attack on the validity of the order.

[*To be concluded*]

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[129]Sterling v. Constantin, 287 U. S. 378 (1932).

[130]Dissenting opinion, Panama Refining Co. v. Ryan, 293 U. S. 388, 446 (1934).

REMEDIES AGAINST A MUNICIPAL CORPORATION AFTER PERFORMANCE OF A DEFECTIVE CONTRACT

*Jacob D. Guice**

The history of local governmental liability has handed us many cloudy concepts involving a governmental immunity which arose when such bodies engaged in relatively few activities. These governmental agencies[1] now engage in numerous and necessary activities to such an extent that their functions are now akin to those of private corporations, and should have consequences of a like nature.[2] Particularly in the contract relationships between municipalities and private contracting bodies have these concepts caused confusion, misunderstanding, and at times, even the grossest sort of injustice.

Several theories of recovery have been propounded to remedy the situation where the contract for either goods or services is invalid and the contractor has performed. A suit may be brought on the contract for the contract price, alleging that the governmental body ratified the contract expressly or impliedly, or that the body is estopped by virtue of certain facts on which the contractor relied to his detriment. The contractor can also sue for the reasonable value of his goods or services in general assumpsit on the common counts based on an implied-in-fact promise or on an implied-in-law promise known as quasi contract.

Though both implied-in-fact and implied-in-law promises are usually enforced in general assumpsit[3] on the common counts of *quantum meruit, quantum valebant, or indebitatus assumpsit,* they are separate and distinct notions. "A quasi contract is a legal obligation not based on agreement, enforced either specifically or by compelling the obligor to restore the value of that which he was

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[1]Municipal corporations and counties occupy similar positions under the law of Mississippi as far as contract remedies are concerned. Both have prescribed powers and must function as the legislature dictates. Storey v. Rhodes, 178 Miss. 776, 174 So. 560 (1937); MISS. CODE ANN. (1930) § 2391 empowers municipal corporations to sue and be sued; Section 270 limited by Section 253 embodies such a power for counties.

[2]Tooke, *Quasi-Contractual Liability of Municipal Corporations* (1934) 47 HARV. L. REV. 1143; Vinsell, *Liabilities of Municipal Corporations in Mississippi* (1931) 3 MISS. L. J. 298.

[3]SHIPMAN, COMMON LAW PLEADING (3d ed. 1923) § 59; RESTATEMENT, RESTITUTION (1937) § 5, comment *a*; Corbin, *Quasi Contractual Obligations* (1912) 21 YALE L. J. 534, 548: "When assumpsit is brought to enforce a quasi contractual obligation, it is generally one or more of the common counts that are used. However, there is no objection to a plaintiff's stating a quasi contractual obligation in the form of a special (uncommon) count."

unjustly enriched."[4] The cases with which we shall deal will be aimed at restitution rather than enforcement. Implied-in-fact contracts, which in the strictest sense are genuine contracts, are consensual obligations inferred from the facts. This notion looks towards enforcing the unexpressed intention of the parties, while quasi contract, which is derived from the Roman law[5] and is equitable in its nature, endeavors to find some just solution to the situation in which the parties find themselves.

In order to have a clear understanding of the problem, it is necessary to draw several further distinctions. Municipal corporations, like any corporation, are creatures of limited powers. Naturally there is a realm of activity outside of those prescribed. The concept into which such acts fall is *"ultra vires"*. Courts have been wont to use this concept not only to cover the power to engage in certain activities, but also the manner or mode by which the power is exercised. This is too comprehensive for our present purpose and the term will be limited to its proper sense of scope of power.[6] The fact of their creation prevents municipalities from exercising their powers in any way other than the one prescribed, directly or by inference. At times the legislatures have made it manifest that certain powers could be exercised only in a particular manner.[7] Courts have evaluated this legislative intent by saying that some statutes which must be followed are "mandatory," and others, not so important, as merely "directory,"[8] or, in terms of effect on the contract, as "void" and "voidable".

Among the numerous factors which should be of importance in a determination of the right of recovery in such a situation is the conflict of interests of the state in the larger sense, of the citizens of the local governmental unit, and of the contractor. The state, through the legislature, delegates certain powers which are to be

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[4]Corbin, *Quasi Contractual Obligations* (1912) 21 YALE L. J. 534, 550.

[5]WOODWARD, QUASI CONTRACT (1913) § 2; Corbin, *Quasi Contractual Obligations* (1912) 21 YALE L. J. 534; Radin, *The Roman Law of Quasi Contracts* (1937) 23 VA. L. REV. 241.

[6]"For the purpose of clearly defining the rights and duties of all the parties to a municipal contract, an *ultra vires* contract, as the term will be used herein, and according to its strict and true construction is a contract which it is not within the power of a municipal corporation to make under any circumstances or for any purpose." 3 MCQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1928) § 1274.

[7]Some courts erroneously call this failure to follow a prescribed mode *ultra vires*.

[8]Legality of the act, a possible classification, is of little concern here, because courts can and do apply their particular rules to situations involving illegality.

exercised in a certain mode. Evidently the state desires that the local unit perform governmental functions which will inure to the benefit of the larger body. Where any mode of exercising power is prescribed, there seems to be little reason for following it other than the insuring of the achieving of the desired ends—that is, the performance of the unit's particular function. For this same reason of securing results in accordance with some supposed plan promulgated by the legislature, the state could have some interest in preventing the exercise of powers the counties or municipalities do not have. If a course of action—though it be not the one the legislature planned—leads to the performance of a proper function, it cannot be correctly said that the courts are allowing something to be done by indirection that could not be done by direction, or that the will of the legislature is being defeated. The proper procedure seemingly would be to determine what was the will of the legislature. Moreover, one might maintain that the state has an interest in promoting fairness of conduct as the term is understood by its citizens. On the other hand, the citizens and taxpayers have an interest in guarding the treasury of the governmental unit, in receiving the benefits derived from the proper exercise of governmental functions, and in exercising the voice in public affairs inherent in our form of government. Experience has proved that handiwork of unscrupulous politicians render these "fears" far from illusory. The contractor, after having placed his goods or services at the disposal of the agency who thereby has been benefited, desires compensation therefor.

The various remedies are so varied and confused that an analysis with the above considerations in mind is necessary.[9] Especially is this true of the notions of ratification and estoppel. Both theories are directed toward enforcing the contract. Ratification, however, embodies some ideas of positive action in affirmance, while in estoppel there is a disability to deny.

Where a contract is *ultra vires*, there may be no ratification[10] save by the legislature.[11] The general proposition is true that mu-

[9]3McQuillin, Municipal Corporations (2d ed. 1928) § 1357.

[10]Marsh v. Fulton County, 10 Wall. 676 (U. S. 1870); Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa 234, 91 N. W. 1081 (1902); Reed City v. Veneer & Panel Works, 165 Mich. 599, 131 N. W. 385 (1911); Fancher v. Board of Commissioners, 28 N. M. 179, 210 Pac. 237 (1922).

[11]This is true where the legislature had the power to authorize the contract in the first place. Leavenworth v. Leavenworth City, etc., Co., 69 Kan. 82, 76 Pac. 451 (1904); Brown v. City of New York, 63 N. Y. 239 (1875); Wharton v. Greensboro, 149 N. C. 62, 62 S. E. 740 (1908). *Contra*: Choisser v. People, 140 Ill. 21, 29 N. E. 546 (1882).

nicipalities may, through proper authorities, either expressly[12] or impliedly[13] ratify contracts not *ultra vires*. This proposition is limited, in that a contract which violates a mandatory provision of law, such as competitive bidding, usually cannot be ratified.[14] Often situations in which there can be implied ratification involve some of the elements of estoppel.

Quite frequently estoppel is applied in the same situation as, or in conjunction with, ratification. Where the contract is *ultra vires*, the body is not estopped.[15] In order to have a true estoppel one must rely to his detriment. This involves the concept of notice, which has been frequently litigated in connection with estoppel by recital in municipal bond cases.[16] Contractors of the sort under discussion are held on stricter notice than in the bond cases, which are influenced by the negotiable character of the instrument, and the needs of municipal finance. Usually there is a possibility of application of estoppel wherever there is a defective execution of a power and the court is willing to say the contract is not void but voidable.[17] It is rather infrequent for a municipality to be estopped from denying the authority of its agent who made the contract.[18]

A wise application of either of these two doctrines can result in little harm to the interests of the government or the taxpayer. Since ratification is akin to original proper execution, the effect is much the same as where the agency does any act in an authorized manner. Likewise, estoppel, being an equitable doctrine applicable

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[12]Marsh v. Fulton County, 10 Wall. 676 (U. S. 1870); Great Lakes Dredging and Dock Co. v. Chicago, 353 Ill. 614, 188 N. E. 196 (1933); Lucier v. City of Manchester, 80 N. H. 361, 117 Atl. 286 (1922).

[13]Bruce v. Dickey, 116 Ill. 527, 6 N. E. 435 (1886); Union Water Meter Co. v. New Martinsville, 83 W. Va. 480, 98 S. E. 516 (1919).

[14]Clinton Const. Co. v. Clay, 34 Cal. App. 625, 168 Pac. 588 (1917).

[15]Dixon County v. Field, 111 U. S. 83 (1884); Daviess County v. Dickinson, 117 U. S. 657 (1885); State v. Minn. Transfer R. R., 80 Minn, 108, 83 N. W. 32 (1900); Hill Dredging Co. v. Ventnor City, 77 N. J. Eq. 469, 78 Atl. 677 (1910).

[16]Recitals can estop municipalities from denying the validity of bonds in the hands of a holder in due course where it deals with functions of local officials who were under a duty to know the facts recited. However, the bondholder is on notice of state constitutions and statutes and cannot rely on the recital if the official has a prescribed way of ascertaining which was not followed. Town of Colona v. Eaves, 92 U. S. 484 (1875); Chaffee County v. Potter, 142 U. S. 355 (1892); Gunnison County Comm'rs. v. Rollins, 173 U. S. 255 (1899); Notes (1913) 13 Col. L. Rev. 152, (1937) 4 Duke B. A. J. 112, (1923) 72 U. of Pa. L. Rev. 196.

[17]Scott County v. Advance-Rumley Threshing Co., 288 Fed. 739 (C. C. A. 8th, 1923); Edwards v. Kirkwood, 147 Mo. App. 599, 127 S. W. 378 (1910); Note (1907) 20 Harv. L. Rev. 564.

[18]Dixon County v. Field, 111 U. S. 83 (1884); Daviess County v. Dickinson, 117 U. S. 657 (1885); Newberry v. Fox, 37 Minn. 141, 33 N. W. 333 (1887); Williams v. Fargo, 63 N. D. 183, 247 N. W. 46 (1933).

only where there is actual power, should have the same result. The contractor is the only one to complain, because municipal authorities, being just as eager to avoid just obligations as many private individuals, might give him little on which to base his action. Cases can be imagined in which he would not get all the relief necessary. Since both aim at enforcing the agreement, most often the contractor must get all or none. Possibly a recovery of a less amount might prevent gross injustice and at the same time tend to promote a respect for the procedure designated by the legislature.

The doctrines of quasi contract and implied-in-fact contract do care for this latter consideration. The courts of the various jurisdictions have been wont to make few distinctions between these two theories.[19] For our present consideration, where there always has been some express contract, there is some justification for this failure to distinguish, because the express contract, though invalid, did show the intent of the parties, from which the contract inferred from the facts might differ somewhat. Viewing the invalid contract as having no legal effect and therefore as no contract, the implied-in-fact rationale can be upheld. Usually if a municipality by some express contract is empowered to be obligated, and if the contract is not against public policy or an express statutory prohibition, the doctrine is applicable.[20]

Quasi-contractual theories are the basis for recovery in an ever increasing number of situations.[21] For quite some time there has been allowed a return *in specie* of money or whatever was turned over to the municipality under an *ultra vires* contract, where there could be no detriment to the political agency.[22] There has been an expansion of this doctrine in some situations of contracts either *ultra vires* or violative of a mandatory provision, where the contractor recovered not only the article but also rent for its use[23]

[19]For a distinction between the two notions, see Note (1937) 9 MISS. L. J. 349.

[20]Vito v. Simsbury, 87 Conn. 261, 87 Atl. 722 (1913); Armstrong v. Seattle, 180 Wash. 37, 38 P. (2d) 377, 97 A. L. R. 826 (1934); Notes (1933) 84 A. L. R. 936, (1937) 110 A. L. R. 153.

[21]Tooke, *Quasi-Contractual Liability of Municipal Corporations* (1934) 47HARV. L. REV. 1143; Notes (1904) 4 COL. L. REV. 67, (1937) 25 GEO. L. J. 758, (1933) 21 KY. L. J. 489, (1920) 4 MINN. L. REV. 155, (1932) 10 N. Y. U. L. Q. REV. 64, (1934) 11 N. Y. U. L. Q. REV. 662.

[22]Louisiana v. Wood, 102 U. S. 294 (1880); Lafrance Fire Engine Co. v. City of Syracuse, 33 Misc. 516, 68 N. Y. Supp. 894 (Sup. Ct. 1900); Note (1934) 93 A. L. R. 441.

[23]Higgins v. San Diego Water Co., 118 Cal. 524, 45 Pac. 824 (1896); Lincoln Land Co. v. Grant, 57 Neb. 70, 77 N. W. 349 (1898). For liability for use under invalid contract see Note (1926) 42 A. L. R. 632; Note (1938) 44 W. VA. L. Q. 160.

and where bondholders, no longer able to have a return of their money *in specie*, have been allowed constructive trust remedies for the buildings for which their money was expended.[24] In most cases where the contract is clearly *ultra vires*, there has been no recovery.[25] If the power must be exercised in a particular way (mandatory provisions), a growing minority allows recovery.[26] The contractor is compensated for the benefit his goods or services have bestowed upon the municipality in almost all contracts whose objects were *intra vires* the agency but in which there was merely technical irregularity.[27]

American-Lafrance, Inc., v. City of Philadelphia,[28] recently handed down by the Supreme Court of Mississippi sitting *en banc*, introduces many of the problems found in this jurisdiction. The city had not quite complied with the proper formality of entering on the minutes an order necessary for a valid sales contract for the purchase of a fire truck. Upon a lapse of payments the vendor sued to foreclose a purchase-money lien against the fire truck or for repossession thereof and for reasonable compensation for its use, and was awarded a return of the truck with reasonable compensation for its use. The court reasoned that since there was no sale there could be no purchase-money lien or *quantum valebant*. This begged the question, for the issue before the court, in a restated form, was whether the city would be held to buy the truck aside from the express contract. In deciding that the city was liable for rent, *Crumps v. Colfax County*,[29] which involved a rent transaction,

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[24]Chapman v. County of Douglas, 107 U. S. 348 (1882); Nuveen v. Board of Public Instruction, 88 F. (2d) 175 (C. C. A. 5th, 1937); Note (1934) 93 A. L. R. 452; Note (1937) 16 N. C. L. REV. 42.

[25]Potter v. Metuchen, 108 N. J. L. 447, 155 Atl. 369 (1931); Williams v. Fargo, 63 N. D. 183, 247 N. W. 46 (1933); Notes (1933) 84 A. L. R. 962, (1937) 110 A. L. R. 159; Note (1922) 31 YALE L. J. 779; *cf.* Note (1937) 50 HARV. L. REV. 531.

[26]O'Neill v. South Omaha, 102 Neb. 836, 170 N. W. 174 (1918); U. S. Rubber Products, Inc. v. Town of Batesbury, 183 S. C. 49, 190 S. E. 120 (1937); Abrams v. Seattle, 173 Wash. 495, 23 P. (2d) 669 (1933).

[27]Argenti v. City of San Francisco, 16 Cal. 256 (1860) is often cited as the leading case for quasi-contractual liability. Field, who is often quoted as favoring such liability, really concurred, specifically stating he disfavored such liability, and eventually won out in Zottman v. San Francisco, 20 Cal. 96 (1862), which is a leading case denying implied liability. Cases on both sides are collected in Notes (1933) 84 A. L. R. 936, (1937) 110 A. L. R. 153; Notes (1921) 34 HARV. L. REV. 439, (1928) 26 MICH. L. REV. 335, (1932) 17 MINN. L. REV. 101.

[28]183 Miss. 207, 184 So. 620 (1938).

[29]52 Miss. 107 (1876). Recovery on *quantum valebat* was allowed where there was a verbal contract, invalid because not entered in the minutes, to rent office space to the county.

was cited as authority. *Smith County v. Mangum*[30] and *Amite County v. Mills*[31] were ignored. A dissent asked that they be overruled in favor of the *Crump* case and pointed out that an invalid lease contract would result, under the holding in a reasonable rental, while an invalid sale would result also in a reasonable rental. The court did lay down the following rules, which, though dicta, should have much authority: "These are: (a) Where there has been in the transaction actual moral corruption, both on the part of the seller and of the officers or agents of the municipality, or actual corruption on the part of the one side with the knowledge and acquiescence of the other. In such a case the court, as a general rule, will extend no aid, but will leave the situation as it is found. (b) Where the municipality is not authorized in any manner or at any time to make the pretended contract, where the transaction is not within an object authorized by the law under any circumstances, in which case the seller, in the absence of actual corruption, may repossess the property, but nothing for its use. And (c) where the municipality is not authorized in any manner or at any time to lease the property in issue, in which case, in the absence of actual corruption, the lessee may repossess the property but nothing for its use. And in the three situations dealt with in this paragraph it is immaterial that the purported contract may have been executed with all the formalities and in the observance of every detail which would be required in a lawful contract."[32]

Before proceeding with a further analysis, two considerations must be noticed. No Mississippi case expressly overruled any other case. The subject matter of each purported contract was one with which the particular governmental body could in some proper manner contract. In connection with this the court did say in some cases that it was mandatory that certain powers be exercised in a special mode.

What form or theory of action would be best for a contractor and what his remedies are cannot be definitely ascertained with all of these diverse holdings. The *American-Lafrance* case does seem to preclude further discussion on the propositions that fraud will

[30]127 Miss. 192, 89 So. 913 (1921). Under a contract defective because not entirely in the minutes, a bridge was built by the contractor and accepted by the county, yet there was no recovery in contract or on the common counts.

[31]138 Miss. 222, 102 So. 465 (1925). A recovery in *quantum meruit* for work done on the roads was denied because an allegedly mandatory requirement was not followed. A dissent criticized the court for failing to distinguish power from mode of exercising the power.

[32]183 Miss. 207, 219, 184 So. 620, 621 (1938).

bar an action; that the object of the transaction must be one authorized by law; that a vendor or lessor can repossess, without compensation for its use, property in the hands of the city where there has been an unauthorized lease or *ultra vires* transaction accompanied by no corruption.

The remaining problem involves a determination of the compensation available to the contractor where the object of the contract is a proper one.[33] Despite the holding in *Jefferson County v. Arrighi*,[34] that there could be no ratification of a contract which was adopted in the beginning in an improper manner, the ratification theory for the recovery of the contract price seems to have some efficacy. *Groton Bridge Co. v. Warren County*[35] indicated that there can be a ratification. *Russell v. Copiah County*,[36] in holding that part payment under a void contract did not amount to a ratification, implicitly held that some contracts could be ratified. The Circuit Court of Appeals in *Independent Paving Co. v. City of Bay St. Louis*[37] did hold that there could be no recovery of the contract price. On what theory this holding was predicated cannot be ascertained from a reading of the report. However, the Supreme Court of Mississippi cited the case in *Magee v. Mallett*[38] as a ratification case. This latter case does come out and say that there could be a ratification and gives a recovery on that basis. It would seem that ratification would be an issue of fact for the jury to be determined by the particular circumstances of each case. Of course the original act must be capable of ratification in that it was not *ultra vires* or contrary to some so-called mandatory statutes as in the *Jefferson County* and *Warren County* cases.

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[33]The improbable situation where the contractor desires repossession despite an offer of payment does not deserve discussion.

[34]54 Miss. 668 (1877). Mandamus to compel payment of a warrant for the contract price of work was denied. The court held that there could be no ratification of a contract made by a delegated agent contrary to an express statutory provision.

[35]80 Miss. 214, 31 So. 711 (1902). In constructing a bridge the contractor at the request of the county engineer made certain additions not provided for in the contract. No recovery was allowed because of a mandatory prohibition of anyone other than the board as a whole making a contract.

[36]153 Miss. 459, 121 So. 133 (1929). Recovery was denied upon a suit on a contract invalid for failure of competitive bidding. Performance, acquiesced in by the county, and part payment, were held not to constitute ratification.

[37]74 F. (2d) 961 (C. C. A. 5th, 1935). The contractor paved a street under a contract invalid for failure of publication. The contract price was recovered under either a ratification or an estoppel theory after the city had approved and paid for part of the work, ratified a change, and agreed to an assignment.

[38]178 Miss. 629, 174 So. 246 (1937). Without citing or distinguishing earlier cases, the court held that to allow a bill for work done under an oral contract which was invalid because not entered properly in the minutes, was a ratification.

Seemingly the *Independent Paving Co.* case could be used in support of an estoppel argument as well. It is interesting to note that the brief of the appellant Paving Co. relied principally on estoppel. There would be more danger in this theory than in the previous one. The question as to the estoppel of a governmental agency in Mississippi is always a delicate one, but cities can be estopped in certain situations.[39] In *Witherspoon v. City of Meridian,*[40] where estoppel in a boundary dispute against the city was denied, the court said: "There may be cases where we would not hestitate to use the beneficent doctrine of estoppel in pais against a municipality." The difficulty in this argument arises when there is a determination of the circumstances in which estoppel will lie. The court in denying an estoppel in *Edwards Hotel & City R. R. v. City of Jackson,*[41] said: "There seems to be little dissent from the view that an ultra vires contract made with the agents of the city cannot operate as an estoppel. . . . All parties dealing with the city must take note of its charter and the power of its officers." This statement embodies some of the many difficulties in this doctrine. Just what does constitute an *ultra vires* act? The dissents in the *Amite County*[42] and *Edwards House*[43] cases pointed out that the court failed to distinguish improper mode from *ultra vires.* Then there remains the question of how much notice the contractor will be held to have. Although one could spell out an estoppel argument in every case which has appeared in the Supreme Court, neither the courts nor the lawyers have applied this theory to any great extent in this type of case. In all probability, in their fear of estopping government agencies by the acts of their agents, the courts will not turn a ready ear to this argument.

The situation with regard to the implied-contract theory of recovering reasonable value is a most peculiar one. The early cases[44] gave such a remedy. Without overruling this line, the

[39]City of Vicksburg v. Marshall, 59 Miss. 563 (1882); City of Jackson v. Merchants' Bank & Trust Co., 112 Miss. 573, 73 So. 573 (1917).

[40]69 Miss. 288, 295, 13 So. 843, 844 (1891).

[41]96 Miss. 547, 575, 51 So. 802, 805 (1910).

[42]127 Miss. 192, 89 So. 913 (1921), see note 30 *supra.*

[43]Edwards House Co. v. City of Jackson, 138 Miss. 644, 103 So. 428 (1925), 42 A. L. R. 625 (1926). The hotel sold land to the city for a road. The deed, which contained a rental feature in case of unenforceability as a deed, was invalid. In language broad enough to deny all quasi-contractual or impliedly contractual liability, there was no recovery for rent for beneficial use because leasing roads was suposedly *ultra vires.*

[44]Methodist Episcopal Church v. Vicksburg, 50 Miss. 601 (1874) (Upon an action of assumpsit to recover the value of 60,000 bricks belonging to the church, sold to and used by the city, the Supreme Court allowed a recovery on an implied contract deduced by inference from corporate acts.); Crump v.

Smith County case[45] denied a remedy of implied contract. This case cannot be distinguished from the others except on the argument that the mode of adopting the contract was mandatory here and not in the previous cases. It would seem that the holding that the statute was mandatory would be a mere technique rather than a compulsory argument. The facts in the *Smith* case cry out for a different result; so one could hardly believe that this notion would determine the result. The *Amite County*,[46] *Edwards House Co.*,[47] and *Attala County*[48] cases upheld the *Smith County* case. Since the cases denying a remedy on the common counts are most recent it would be wiser not to attempt to use this theory unless the *American-Lafrance* case can be fitted into an implied-contract doctrine. In this case the *Crump* case[49] was cited as holding that one can obtain rent for the use of property and therefore determinative of the issue before the court. It must be observed that the *Crump* case involved a lease transaction. There the court in reality upheld the transaction but substituted a reasonable valuation for that of the contract. Here the transaction was one of sale and not of rent, yet rent was given. The facts do not imply a rent contract. The court expressly said there could be no *quantum valebant*.[50] The court's refusal to overrule the *Smith County* and *Amite County* cases adds persuasion to the proposition that the court did mean not to reinstate the implied-in-fact contract notion, or at most to apply the doctrine only to the narrow lines of the particular cases. The plea of the complainant, "to foreclose a purchase money lien against the fire truck or for repossession thereof and for reasonable compensation for its use", might have caused some misunderstanding. The court could have been bothered with theoretical difficulties as to change of title in sales law and believed that there could be a purchase-money lien only when there was a valid express sales contract. Assuming this, the court could have been concerned only with rental demand of complainant. The court then would

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Colfax County, 52 Miss. 107 (1876), see note 29 *supra;* Gulfport Sash, *etc.* Co. v. Town of Bond, 95 Miss. 723, 49 So. 26 (1909) (The contractor recovered the reasonable value of goods furnished the town and used by it in the construction of a building.)

[45]127 Miss. 192, 89 So. 913 (1921), see note 30 *supra.*

[46]138 Miss. 222, 102 So. 465 (1925), see note 31 *supra.*

[47]138 Miss. 644, 103 So. 428 (1925), 42 A. L. R. 625 (1926), see note 43 *supra.*

[48]Attala County v. Miss. Tractor & Equipment Co., 162 Miss. 564, 139 So. 629 (1932). No recovery was allowed for machinery sold to the county. Since there was no authorization to purchase, the court said there could be no implied liability.

[49]52 Miss. 107 (1876), see note 29 *supra.*

[50]183 Miss. 207, 184 So. 620 (1938).

have a better excuse for saying the *Crump* case was the only one *exactly* in point. Nevertheless, the *Smith County* line of cases seems to deny all implied-contractual obligations of cities or counties. To say this case gives one would hardly be consistent with that line.

From a reading of the Mississippi cases one cannot be certain as to what the court means by "implied liability" which was denied in broad terms in the *Smith County* case. Genuine implied-in-fact contract must be the meaning the court desired because the restitutionary remedy given in the *American-Lafrance* case is of a quasi-contractual nature,[51] and the dictum quoted above from that case is also of the same vein. The fact that the action is in equity is of no consequence. Professor Corbin says: "The same may be said of debt, of account, of a bill in equity, . . . of a civil action brought under the codes. Any of them may be used to enforce either a contract or a quasi contract. The distinction is one of substance, not of form, and depends upon the facts and the proof."[52] "Implied liability" in the proper usage would include these quasi-contractual remedies which the courts actually give. It is true that this distinction cannot explain all of the cases, but it would permit recovery from the city by an action at law in some cases which the broad language of the courts seemingly forbids. In all the previous cases on this matter the court talked in terms of the transaction which the purported contract and the facts supported. Because of the variance between factual inference and relief as well as the above considerations, it would seem that if the *American-Lafrance* case be authority for any action at law it would be authority for an implied-in-law or quasi-contractual recovery. The rule is laid down in the case that:

> . . ."when there has been an entire fairness in the dealings between the seller and the municipal officers and agents, and the transaction has throughout been conducted in the open, in such manner that any of the public within the municipality might at any time see, or upon inquiry may know, in truth, all that is or has been going on about it; when all these substantial steps have been taken, which are designed in their requirement to avert, so far as reasonably practicable, all opportunities for favoritism or extravagance, or of temptation toward unlawful private profit, and when only defects in contract are in ommissions

[51]Corbin, *Quasi Contractual Obligations* (1912) 21 YALE L. J. 534.
[52]Corbin, *op. cit. supra* note 51, at 549.

> in a technical aspect . . . the seller may recover a reasonable compensation for the use of his property."[53]

The conditions imposed in this rule militate for a theory of contract implied-in-law.

The same considerations which indicate that the theory of recovery is quasi contract are arguments in favor of the application of this theory to cases of this sort. The necessity and difficulty of finding some resolution of the conflicting interests here is manifest. Under the ratification or estoppel theories the contractor gets all or none. To recover he often must show more than the mere making of the so-called contract and his performance under it. Cases can arise where this is all he can show, yet he has acted in a *bona fide* belief that he had a good contract and deserves some compensation. While this is true, there have been defects in making the contract, and the taxpayers of the political body should have their interests protected. There should be some guide to remedy this situation. The implied-in-fact contract doctrine is of much use, because there is always a recovery of reasonable value which protects to some extent both the contractor and the public. The situation in the *American-Lafrance* case shows a weakness in this doctrine. Perhaps some relief other than from a contract of the sort indicated by the facts would serve better. Let the law then imply some contract which will accommodate the situation. A quasi-contractual remedy has all the advantages of the others without the rigidity imposed by them. The rule of reasonable value would give the contract price if it was deserved. This remedy does put the contractor at a disadvantage in that the burden of proof of value of the benefit to the municipality would be added to him. This disadvantage would be compensated for by the added protection of the public. Under this broad equitable doctrine each case could be decided on its own particular merit and consideration without being tied down by some rule which might bring about the unfair result of the *Smith County* case. Whether the transaction is within a recognized power, whether the state's public policy behind the mode of exercising this power is protected, whether the transaction was without corruption, whether the taxpayer's interest was protected, and what was the value of the services rendered or the goods sold—all these would be considered in reaching a fair result.

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[53]American-Lafrance, Inc. v. City of Philadelphia, 183 Miss. 207, 220, 184 So. 620, 622 (1938).

Perhaps the *American-Lafrance* case points out a new technique for some cases of this sort under discussion. It is important to notice that the case came up in equity in an attempt to foreclose on a purchase-money lien. While this relief was not granted, some relief in accordance with petitioner's prayer was given. In many of these cases where equitable grounds for relief can be found, it would seem wise to bring a suit in equity praying for that relief and such other general relief as the facts warrant. Some of these cases would get before the chancellor who could give such relief as equity and good conscience dictate. This could not possibly be as good a solution for the whole problem as a quasi-contractual remedy, for many cases would not be accommodated; but some cases might receive a more lenient treatment and a fairer result might be reached as in this case.

The full meaning of *American-Lafrance v. Philadelphia* is not now known. Even if the case does not establish a quasi-contractual remedy, still its narrowest interpretation does embody some hope—a hope almost blotted out by the *Smith County* line of cases—of alleviating some situations which can be fitted into particular holdings of newly strengthened cases.

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STATE BAR SECTION

REPORT OF EXECUTIVE COMMITTEE OF JUNIOR BAR SECTION

A program of work has been adopted by the Executive Committee of the Junior Bar Section of the Mississippi State Bar Association, which includes the following activities:

A Legislative Drafting Committee which has offered its services to the members of the legislature in the drafting of bills which the legislators want to introduce. This is a service which is offered the members of the legislature in order that the bills might be in proper form.

The committee on the Bureau of Identification was continued for the purpose of pushing the recommendation of the Section that a Bureau of Identification be created by the legislature.

In order to be of service to those entering the practice of law, a committee has been appointed to cooperate with the young lawyers in every way possible.

The Code Committee of the past year, the chairman of which was Ed Brunini, did such splendid work, that the section felt this work should be continued and a committee to carry this work on has been appointed.

It was felt that the study of our present pleading, practice and procedure should be continued with a view of making such changes as will best fit our state; and to work towards the setting up of machinery whereby the new Federal Rules could be adopted to our state practice as soon as a majority of the lawyers in Mississippi so desire. This is in accord with the resolution passed at the Section's last meeting.

In order that such proposed changes as recommended by the Section might be enacted, a Legislative Committee has been appointed with the duty of guiding through the legislature such changes.

The Executive Committee felt that the study of our present standards of admission to the bar should be studied, and a committee is working on this at this time.

The Executive Committee was unanimously of the opinion that action should be taken to improve the relations between the bar and the public, and as a result a Public Relations Committee has been appointed to take such steps as it feels will bring about this result.

Ed Brunini and several other members of the Junior Bar Section are very much interested in working on the annotations to the Restatement of the Law. Ed and several others are doing this work now, and as a result the work has been adopted by the Section. Ed has been named chairman and all others interested in this work are urged to contact him immediately. The committee did not feel that it should appoint the members of this committee, but that the membership should be composed of those interested in the work. If any member would like to do this work, such member should contact Mr. Ed Brunini of Vicksburg, Mississippi, at once.

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NOTES

When May The Court Direct A Verdict In Mississippi?

I. *For the Defendant*

How much evidence need a party plaintiff[1] introduce in order to preclude the possibility of having a verdict directed against him? This question has been repeatedly asked of various courts, and there is a great deal of difference in the effect of some of the decisions made in reply. In deciding whether a plaintiff has made out a case entitling him to get to the jury, most jurisdictions have employed one of three distinct "tests":

(1) If there is a "spark" or a "glimmer" or a "scintilla" of evidence proving or tending to prove the plaintiff's case, a peremptory instruction instruction for the defendant is not proper. This test will be referred to as the "scintilla" rule.[2]

(2) If the plaintiff's evidence, taken alone and considered as undisputed, does not reasonably establish his case, a verdict should be directed for the defendant. Reference will be made to this test as the "plaintiff's-evidence" rule.[3]

(3) If after hearing all the testimony offered by both parties the court is of the opinion that a verdict for the plaintiff, if rendered, should not be allowed to stand, it may direct peremptorily for the defendant. In such cases jurisdictions following one of the first two rules grant a new trial. This test will be referred to, therefore, as the "new-trial" rule.[4]

The difference in these rules is manifest. By the first, not only is the plaintiff's testimony alone to be considered, but this testimony is to be carefully searched for a "scintilla" of evidence which proves or tends to prove the plaintiff's case and thus entitles him to reach the jury. By the second, the plaintiff's evidence must be sufficiently substantial *reasonably* to establish his case. Nevertheless, if his evidence, *in itself*, does so establish his case, the is-

[1]The term "plaintiff" is used to refer to the party having the burden of proof, and thus includes a defendant who attempts to establish an affirmative defense.

[2]For a detailed discussion of this rule, see Ford v. Papcke, 26 Ohio App. 225, 158 N. E. 558 (1927). Some courts have designated as the scintilla rule tests which are not so extremely liberal to the plaintiff. See notes 3 and 18 *infra*.

[3]Illustrating this rule is the decision in McDonald v. Metropolitan Life Ins. Co., 167 N. Y. 66, 60 N. E. 282 (1901). Some courts have treated this rule as the scintilla rule. See Dutton v. Atlantic C. L. R. R., 104 S. C. 16, 88 S. E. 263 (1916).

[4]This rule is followed in Spaulding v. Mutual Life Ins. Co., 94 Vt. 42, 109 Atl. 22 (1920). The plaintiff's-evidence and new-trial rules are not generally recognized by those names and have been so designated for the purpose of avoiding repeated restatements of the rules. For an excellent discussion of the three rules, see Smith, *The Power of the Judge to Direct a Verdict: Section 457-a of the New York Civil Practice Act* (1924) 24 Col. L. Rev. 111, 113-125.

sue must be submitted to the jury, no matter how convincingly the defendant might prove that the facts are otherwise.[5] By the third, the defendant's evidence is to be taken along with that of the plaintiff, and if the court is of the opinion that a verdict for the plaintiff would be palpably against the weight of the evidence, a peremptory instruction for the defendant does not constitute reversible error. And this obtains even though the plaintiff's evidence, taken alone and as undisputed, would reasonably establish his case.

What stand has the Mississippi court taken? In *Perry v. Clarke*,[6] decided in 1841, the court recognized for the first time that a peremptory instruction, under some conditions, is proper.

> "And we feel bound to approbate also that practice which there prevails as to the power of the court to charge the jury to find for the defendant where the plaintiff has wholly failed to make out his case and there is no conflicting testimony which requires the intervention of the jury."[7]

The Supreme Court having thus given to the trial judge the power to instruct peremptorily, future litigation imposed upon it the necessity of deciding when such a power could properly be exercised. In trying to make this decision the court, mindful of the principle that resolving conflicts in the testimony is the province of the jury and at the same time desirous of retaining for itself the power to dispose of flagrantly unmeritorious cases, has been consistently inconsistent.

Various decisions of the court offer substantial support for each of the three rules discussed. The scintilla rule is favored in *Wilson v. Clarke*.[8]

> "In regard to the refusal of the court to direct a verdict to be rendered discharging the defendant Johnson, we think the decision was proper. Had there been *no evidence whatever* tending to show or from which the conclusion might have been drawn that the timber was in the possession of the firm . . . the court should have directed the verdict instantly in favor of Johnson. 1 Greenleaf Ev. 358. But the plaintiff had offered evidence . . . and though this might not be considered as sufficient evidence to charge the firm, yet it could not be said that there was a total want of evi-

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[5]This does not necessarily obtain when the defendant makes an affirmative defense. In such a case the defendant becomes the party having the burden of proof as far as that particular plea is concerned. See note 57 *infra*.

[6]5 How. 495 (Miss. 1841).

[7]*Id.* at 501. It is to be noticed that this language suggests a policy consistent with the scintilla rule.

[8]27 Miss. 270, 275 (1854).

> dence tending to charge them, and it is only in the absence of all evidence that this power should be exercised by the court."[9]

Thus the amount of evidence introduced by the plaintiff is immaterial. A "spark", a mere "trifle", or a "glimmer" of evidence proving or tending to prove his case is all that is required to necessitate the submission of the issue to the jury. In adopting this policy the court reserves to itself the naked right to determine whether there is anything in the evidence tending to prove the contention of the plaintiff, which reservation amounts to no more than a recognition of the well established principle that it is the province of the court to determine the relevancy of evidence.

Of like tenor is *Lowenstein v. Powell.*[10]

> "If there was no evidence in the case upon which a verdict in favor of the plaintiffs and against the wrongful suing out of the attachment might have been based. . . . the court's peremptorily instructing for the defendant was correct. Otherwise the ruling complained of was error.
>
> "Was there then any evidence which supported or tended to support the grounds of suing out the attachment and on which the jury might have found for the plaintiff. If there was such evidence then it should have been submitted to the jury for its consideration and determination."

These decisions, while they do no adopt the scintilla rule in express terms, do, when compared with intervening decisions, indicate an intermittent adherence to a policy which could not lead to results very different from those reached by an application of that rule and which is at least more consistent with it than with either of the other two.

A well recognized practice of the court makes it clear, however, that the fact that the plaintiff's evidence meets the required standard (whatever that standard might be) does not put the defendant completely at the mercy of the jury. At least as early as *Sims v. McIntyre*[11] and certainly many times thereafter[12] the court has set aside jury verdicts as being against the weight of evidence and remanded the cases for new trial.

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[9]Italics supplied.

[10]68 Miss. 73, 77, 8 So. 269, 270 (1890).

[11]8 Sm. & M. 324 (Miss. 1847).

[12]Two other early cases in which a verdict was similarly set aside are McQueen v. Bostwick, 12 Sm. & M. 604 (Miss. 1849), and Wilson v. Horne, 37 Miss. 477 (1859). Since these decisions this procedure has been followed so frequently as to make further citation unnecessary.

The new-trial rule, if sanctioned by the court, would, in cases similar to *Sims v. McIntyre*, permit a directed verdict for the defendant, and there would be no necessity for the practice of granting a new trial in such a situation. In view of this practice in Mississippi, it seems illogical that the court has ever sanctioned the contention that a verdict can be directed in such a case. It is true that some of the earlier decisions seem to intimate allegiance to this new-trial rule but do not adopt it. In *Chicago St. L. & N. O. R. R. v. Doyle*[13] the court says:

> "Where it is plain that the court should not permit a verdict to stand on the state of facts in evidence, assuming the truth of the testimony and giving full force to every just inference from it, it is folly to wait for a verdict and the court should anticipate its ultimate action and exclude the evidence or instruct the jury as to its insufficiency."

Thus it is manifest that the court was referring solely to those instances in which a verdict should not be allowed to stand because of the insufficiency of the plaintiff's testimony, within itself, and not because of the preponderance of the defendant's evidence. The court went no further than to say that when the plaintiff's evidence is so insufficient as to justify a peremptory instruction for the defendant, there is no use in submitting the case to the jury for a useless and ineffective verdict. The same conclusion is to be drawn from the language of the court in most of the cases that are sometimes cited as pronouncing this rule;[14] but in *Clark v. Moyse*[15] the court definitely propounds the rule and gives it its full effect:

> "The clear preponderance of the testimony is in favor of the appellant on the proposition whether the appellee had any rent note.... Indeed, the court might very properly have given a peremptory instruction for the appellant on that issue, since no other verdict could reasonably have been allowed to stand."

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[13]60 Miss. 977, 985 (1883).

[14]Wooten v. Mobile & O. R. R., 89 Miss. 322, 42 So. 131 (1906); Mobile, J. & K. C. R. R. v. Jackson, 92 Miss. 517, 46 So. 142 (1908); McFadden v. Buckley, 98 Miss. 28, 53 So. 351 (1910). The decisions in Holmes v. Simon, 71 Miss. 245, 15 So. 70 (1893) and Town of Flora v. American Express Co., 92 Miss. 66, 45 So. 149 (1907) could be construed as giving full effect to the new-trial rule. These five cases were decided while Judge Whitfield was a member of the court, and the tenor of the decisions suggests that the court was of the opinion that this was the rule. In addition, this new-trial rule is followed by the federal courts, and federal cases arising in Mississippi follow this rule. They are cited in the Mississippi Digest. Cases decided under the Employer's Liability Act and other enactments which require the Mississippi court to be governed by the federal laws also follow this new-trial rule. See, *e. g.*, Elliott v. Gulf M. & N. R. R., 145 Miss. 768, 111 So. 146 (1927).

[15]48 So. 721 (Miss. 1909). Judge Whitfield wrote this opinion, and this decision substantiates the view that the court, in deciding the cases in note 15, *supra*, considered the new-trial rule as effective in Mississippi.

A comparison of these decisions and their dates with those hereinbefore discussed and cited as in line with the scintilla rule makes it obvious that the court had no well-established policy to follow in deciding the propriety of peremptory instructions. Furthermore, in many, if not most, of the early decisions having to do with the direction of verdicts, the court followed neither of these rules and expressed itself in terms showing a definite propensity to take a stand between the two. In *Frizell v. White*,[16] the court in affirming the granting of a peremptory instruction, said:

> "This brings up the propriety of that original judgment which depends upon the inquiry whether the plaintiff's evidence, giving it its full weight and drawing from it every *legal* inference of which it was susceptible and which the jury might *properly* have drawn was sufficient to maintain the action."[17]

In so holding, the court recognizes that a verdict may be based upon an inference, but it definitely, although impliedly, adds that it may not be based upon *any* inference the jury might draw. Evidence from which an inference can be drawn is not necessarily sufficient to sustain a verdict or even to warrant the submission of the case to the jury. There must be evidence which admits of a legal inference which the jury might properly draw. As to what constitutes such an inference, however, the court is non-committal. A standard has been set, but this standard, in itself and without further words of explanation, is so elastic and indeterminate as to vary with the opinion of the judge. The imposition of the standard, however, does lead to the conclusion that the trial court is compelled to exclude an issue from the consideration of the jury under some conditions when there is evidence inferentially supporting the contention of the plaintiff and that these conditions are annouced in such general terms as to allow the court to extend or contract them as further occasion might warrant. In *Garnett v. Kirkman*,[18] different language is used in reaching a result that is to all effects the same:

> "But when the evidence wholly fails to make out the plaintiff's case, and when it does not tend in any just and legal view to establish it, it is the duty and province of the court so to instruct the jury."

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[16]27 Miss. 198, 201 (1854).

[17]Italics supplied. Similar language is used in Swan v. Liverpool, London, & Globe Ins. Co., 52 Miss. 704 (1876); Whitney v. Cook, 53 Miss. 551 (1876); Carson v. Leathers, 57 Miss. 650 (1880); Chicago, St. L. & N. O. R. R. v. Doyle, 60 Miss. 977 (1883); Anderson v. Cumberland T. & T. Co., 86 Miss. 341, 38 So. 786 (1905). Some jurisdictions have designated this test as the scintilla rule. In Sobolovitz v. Lubric Oil Co., 107 Ohio St. 204, 140 N. E. 634, 635 (1923), the Ohio court says that a scintilla of evidence is "any evidence or reasonable inference which may be drawn from evidence which tends to prove a question in issue."

[18]33 Miss. 389, 405 (1857).

Here, again, it is emphasized that evidence tending to prove the plaintiff's case is not enough to preclude the giving of a peremptory instruction for the other party. There must be evidence tending to prove it in a just and legal view, and since the court is the agency to decide upon the justness or legality of the view, the trial judge is again required to direct peremptorily in some cases where there is evidence tending to sustain the contention of the plaintiff.

It must be observed, however, that these decisions applied the condition of being reasonable to the inferences drawn and did not impose upon direct evidence the qualification of being reasonably believable. It was consistently conceded that the evidence submitted by the plaintiff should be given its full weight or accepted as "absolutely true".[19] Thence it necessarily follows that if there was evidence supporting the contention of the plaintiff which directly established the foundational facts of the case, the court could not grant a peremptory instruction.[20] The court, therefore, was not giving full effect to the rule that a peremptory instruction can be granted the defendant when a jury could not, on the testimony of the plaintiff alone, reasonably find a verdict for him. By requiring that the inference be "just" or "legal", the court did not adhere to the scintilla rule, and by not requiring that the testimony of the plaintiff be reasonably believable, the court denied complete adherence to the plaintiff's-evidence rule. But by failing to follow the scintilla rule and employing such a word as "reasonable" in so doing, the court did furnish itself with a means by which it could come to recognize this plaintiff's-evidence rule without flagrantly disregarding the doctrine of *stare decisis*.

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[19]Frizell v. White, 27 Miss. 198 (1854); Whitney v. Cook, 53 Miss. 551 (1876); Carson v. Leathers, 57 Miss. 650 (1880); Mississippi & Yazoo Packet Co. v. Edwards, 62 Miss. 534 (1885); McCaughn v. Young, 85 Miss. 277, 37 So. 839 (1904); Anderson v. Cumberland T. & T. Co., 86 Miss. 341, 38 So. 786 (1905). Since contradictory evidence cannot be considered as absolutely true, the more accurate statements were that the testimony of the plaintiff was to be given its full weight or considered most favorably to him.

[20]Thus if *A* testifies that he saw *B* and *C* talking and soon thereafter saw *B* go to *C's* premises and move certain materials, the court decides whether an inference that *B* acted with *C's* permission could properly be drawn. But if *A* testifies that he heard *C* give *B* permission to go on the premises and move the materials, there is direct evidence that *B* had *C's* permission and the court cannot decide for *C* on that issue, even though it thinks that *A's* testimony is not reasonably believable.

That the court was governed by this limitation is evidenced by the decision in Thomas v. State, 129 Miss. 332, 336, 92 So. 225, 226 (1922). The court in that decision says: "However, an exception to this rule may arise in exceedingly rare cases where, from the whole circumstances. the testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind. In such a case we think it proper to award a new trial on the facts." See also Southern R. R. v. Elder, 118 Miss. 856, 80 So. 333 (1918).

That there was an inclination so to interpret the rule of *Frizell v. White*[21] as to have it require the plaintiff's evidence to be reasonably believable is revealed by *Illinois C. Ry. v. Boehms*:[22]

> "The question on this appeal is not as stated by counsel for the appellee, 'whether there is any evidence showing, or tending to show' liability of the defendant; but the question is whether the evidence is sufficient to warrant a verdict for the plaintiff in any view of it *which may be legally taken.*"[23]

Thus, if the court is of the opinion that a "view" that the plaintiff's evidence is true could not be *legally taken,* a peremptory instruction for the defendant is proper, even though the evidence established the plaintiff's case directly or through logical inference. Language which permits a similar construction is used in *Fore v. Alabama & V. Ry.*[24]

> "There is a distinction in the rules applicable to the action of courts in granting new trials and in giving peremptory instructions. Occasionally it is the duty of a trial court to set aside a verdict and grant a new trial where the judge is of the opinion that the finding of the jury is clearly against the great preponderance of the evidence. But the result is simply a rehearing of the cause, and the plaintiff is protected finally by Code 1892 section 738 against more than two new trials, as review by this court being had only after the final termination of the cause. Action by the jury is a right where the litigant presents testimony which if true fairly tends to prove the case. Peremptory charges should be given only where the evidence taken as absolutely true, *and might be so found by the jury,* establishes no legal right and fails to maintain the issue."[25]

The court reserves to itself the right to determine whether the plaintiff's testimony admits of belief and in so doing gives full effect to the plaintiff's-evidence rule. But, as is explicitly set forth, if a peremptory instruction is being considered, the plaintiff's testimony is to be treated as if undisputed and judged on its merits entirely, a new trial being the remedy available if the plaintiff's evidence is rendered unbelievable by the defendant's evidence.

Thus the Mississippi court has at various times recognized and rejected each of the rules under consideration. A reference to the dates of the cases discussed reveals such a confusing intermingling

[21]27 Miss. 198 (1854), cited *supra* note 17.
[22]70 Miss. 11, 14, 12 So. 23 (1892).
[23]Italics supplied.
[24]87 Miss. 211, 218, 39 So. 493, 494 (1905).
[25]Italics supplied.

of contradictory decisions as to warrant the conclusion that at least as late as 1910 there had been established and accepted no policy demanding the attention of the court. It was still at liberty to make a choice, and the interpretation of the phrase "tends to prove" in *Fatheree v. Griffin*[26] indicates the choice that was made:

> "Appellants argue, however, that the testimony 'tended' to prove the issue, and that therefore a peremptory instruction was improper. The use of the term 'tends to prove' does not contemplate or recognize conjecture. When testimony is being offered and is being justified on the ground that it tends to prove the particular ultimate fact in issue, it must be evidence which proximately relates to that fact, and has a logical and reasonable tendency to prove it, or which naturally progresses or moves in the direction of proving the said ultimate particular fact. And when the taking of testimony is finished, then what is meant to be included by the phrase 'tends to prove' are those logical deductions and reasonable inferences to be drawn from the relevant facts proved, which deductions and inferences, when allowed their full permissible operation, lead to and establish the particular ultimate fact in issue. But manifestly these decisions must have a basis in competent evidence, else there would be allowed to stand that which has nothing whereon to stand."

By such elaboration, the court demonstrates that it has taken advantage of the opportunity afforded by *Frizell v. White* in giving full effect to the qualification there imposed that inferences, to entitle the plaintiff to reach the jury, must be fair. Although still employing language so general as to permit of no definite formula, the court clearly manifests its tendency to depart from any recognition of the scintilla rule and to be more liberal in the granting of peremptory instructions. Numerous decisions ruling that verdicts cannot properly be based on a conjecture or on a possibility[27] further reflect this policy and show conclusively that the court will utilize to the fullest extent its power to judge the tendency of evidence. Illustrative of these more recent decisions is *Mutual Ben. Health & Accident Ass'n. v. Johnson*,[28] wherein the court expressly states that the scintilla rule is not followed in this jurisdiction.[29]

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[26]153 Miss. 570, 576, 121 So. 119, 120 (1929).

[27]Tyson v. Utterback, 154 Miss. 381, 122 So. 496 (1929); Yazoo & M. V. R. R. v. Green, 167 Miss. 137, 147 So. 333 (1933); New O. & N. E. R. R. v. Holsomback, 168 Miss. 493, 151 So. 720 (1933); Williams v. Lumpkin, 169 Miss. 196, 152 So. 842 (1933); Berryhill v. Nichols, 171 Miss. 769, 158 So. 470 (1935); Teche Lines, Inc. v. Bounds, 182 Miss. 638, 179 So. 747 (1938).

[28]186 So. 297 (Miss. 1939).

[29]Another case in which adherence to the scintilla rule is expressly denied is Yazoo & M. V. R. R. v. Lamensdorf, 180 Miss. 426, 177 So. 50 (1937).

As indicated, some of the early cases held that the plaintiff's testimony was to be considered as "absolutely true" or "most favorably to him",[30] and limited the courts power to the judging of the *tendency* of evidence. However, language such as was employed in *Fatheree v. Griffith* provided a transitional device by which the court could, if it so desired, easily and logically bring the plaintiff's-evidence rule, already suggested by *Illinois C. R. R. v. Boehms*[31] and *Fore v. Alabama & V. Ry.*,[32] into operation.

In *Fatheree v. Griffith* the court, by intimating that it would require the "reasonable" inference and "permissible" conjecture to be based on substantial evidence, nanifested an inclination to adopt this rule; and in *Mobile & O. R. R. v. Johnson*[33] the court no longer spoke in terms of conjecture, or possibilities, or reasonable inferences, but directly asserted that the plaintiff's evidence, in order to entitle him to get to a jury, must be reasonably believable.

> "The rule is that, laying aside and leaving out of view the testimony in behalf of the defendant, if the evidence in behalf of the plaintiff is sufficient in law to establish the legal right of the plaintiff in issue and is not inconsistent with the admitted physical facts or with natural laws or common knowledge, and, so viewed, the plaintiff's testimony taken alone is such that reasonable men, acting reasonably, could reasonably believe that testimony and prudently act upon it, then a peremptory instruction for the defendant must not be given. When, however, all the testimony has been heard and all the arguments delivered and the verdict returned, if, upon a completed view of the entire case the trial judge is then of the opinion that the verdict is against the overwhelming weight or clearly against the great preponderance of the evidence, his duty is, upon motion for a new trial, to set aside the verdict and grant a new trial."[34]

Thus the court, though rejecting the new-trial rule,[35] has given the plaintiff's-evidence rule full effect. Numerous recent decisions restate the principle that "everything must be considered as proved which the evidence establishes either directly or by reasonable in-

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[30]See cases cited *supra* note 20.

[31]70 Miss. 11, 12 So. 23 (1892).

[32]87 Miss. 211, 39 So. 493 (1905).

[33]165 Miss. 397, 141 So. 581 (1933).

[34]*Id.* at 493, 141 So. at 582. See also, Justice v. State, 170 Miss. 96, 154 So. 265 (1934); Yazoo & M. V. R. R. v. Lamensdorf, 180 Miss. 426, 177 So. 50 (1937); Teche Lines, Inc. v. Bounds, 182 Miss. 638, 179 So. 747 (1938).

[35]Illustrating the court's refusal to follow the new-trial rule is Columbus & G. Ry. v. Buford, 150 Miss. 832, 840, 116 So. 817, 820 (1928): "We desire to say, however, in addition to this reason for reversal that, because the testimony of Steen was impeached by four witnesses who had known him long, and were intimately acquainted with his character, and who testified that he was regarded

ference."[36] Decisions such as *Mobile & O. R. R. v. Johnson,* however, require the conclusion that this principle is to be given effect only if the plaintiff's evidence which so "establishes" is *reasonably believable,* and thus does not embarrass the court in its application of the plaintiff's-evidence rule in the proper case.

That the court is becoming increasingly prone to instruct peremptorily in cases where it thinks the plaintiff has no meritorious cause of action is made obvious by the decision in *Newton v. Homochitto Lbr. Co.*:[37]

> "It is only in cases where the proof for the plaintiff, when it tends to sustain the issue is so unreasonable and contradictory within itself that it cannot be reasonably accepted as being true that a peremptory instruction should be granted. This is rarely the case. *Whenever reasonable men may differ about which party has testified to the truth, the judge must submit the cause to the jury.*"[38]

In the first sentence quoted, it is expressly held that only the plaintiff's evidence is to be taken into consideration in determining whether a verdict should be directed against him and the plaintiff's-evidence rule is re-stated. But the succeeding statement is contradictory and manifests a favorable attitude to an entirely different policy. "Whenever reasonable men may differ about which party has testified to the truth, the judge must submit the cause to the jury". Conversely, whenever reasonable men cannot differ as to which party has testified to the truth, the judge does not have to submit the case to the jury. The court therefore would be allowed to direct a verdict on the ground that the testimony of the defendant so preponderates that reasonable men could not differ as to which party has testified to the truth, thus adhering to the new-trial rule—one which has been consistently rejected by the court except in a few cases which, by numerous decisions to the contrary, have been impliedly but definitely overruled.

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in his own community as being unworthy of belief and credence . . . Steen is probably not worthy of belief, especially as he was related to deceased; and having given testimony in the interests of his kinsmen's verdict, that such verdict should be set aside and a new trial granted for hearing before another jury, although the court could not and should not give a peremptory instruction for the defendant because of such unsatisfactory testimony." See also, Turner v. State, 180 Miss. 305, 177 So. 520 (1937), which is considered in Comment (1934) 6 MISS. L. J. 447.

[36]McKinnon v. Braddock, 139 Miss. 424, 104 So. 154 (1925); St. Louis & F. Ry. v. Nixon & Phillips, 141 Miss. 677, 105 So. 478 (1925); Yates v. Houston & Murray, 141 Miss. 881, 106 So. 110 (1925); Lowe v. Mobile & O. R. R., 149 Miss. 889, 116 So. 601 (1928); Lee County Gin Co. v. Middlebrooks, 161 Miss. 422, 137 So. 108 (1931); Burnside v. Gulf Refining Co., 166 Miss. 460, 148 So. 219 (1933); Keith v. Yazoo & M. V. R. R., 168 Miss. 519, 151 So. 916; Gravette v. Golden Saw Mill, 170 Miss. 15, 154 So. 274 (1934); Graves v. Johnson, 179 Miss. 465, 176 So. 256 (1937).

[37]162 Miss. 20, 28, 138 So. 564, 567 (1931).

[38]Italics supplied.

Although the general tenor of the decision in *Newton v. Homochitto Lbr. Co.* seems to indicate that the court would not give effect to this last discussed statement, in *Yazoo & M. V. R. v. Lamensdorf*[39] it seems inclined to do so by admittedly considering testimony favorable to the defendant in deciding to instruct peremptorily for the plaintiff:

> "Where such witnesses are supported by corroborating affirmative testimony of other disinterested witnesses and the only testimony in opposition is negative testimony of persons who did not hear the whistle or the bell, their attention being elsewhere, such negative testimony is insufficient to overturn affirmative testimony."[40]

Regardless of the comparative weight of negative and affirmative testimony, the court has here recognized that under some conditions evidence favorable to the defendant can be considered by the court in determining the propriety of a verdict directed in his favor.

These cases did not, however, bring about an adoption of the new-trial rule. In *Thomas v. Williamson*,[41] the court gives detailed consideration to the question, and, after holding that neither the scintilla rule nor the new-trial rule is followed, recognizes the plaintiff's-evidence rule as still being in effect.

> "We have recently had occasion to observe, without elaboration, that the scintilla rule of evidence is not recognized in this state.[42]. . . The attitude of our jurisprudence has been so far away from such a conception of the scintilla rule that in at least three opinions of this Court.[43]. . . it was said that if, upon the evidence, it would have been the duty of the court to set the verdict aside, a peremptory charge would be proper.
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> "It is true that the unguarded expressions in the three cases cited did not accurately state the law upon the question of the propriety of a peremptory instruction; but they show, and are cited to show, how far away this Court has been from any such notion of the meaning of a scintilla of evidence as the technical definition of that term would imply. . . .

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[39]180 Miss. 426, 177 So. 50 (1937).

[40]*Id.* at 448, 177 So. at 52.

[41]187 So. 220 (Miss. 1939).

[42]The court cites Mutual Ben. Health & Accident Ass'n v. Johnson, 186 So. 297 (Miss. 1939).

[43]Here the court cites Wooten v. Mobile & O. R. R., 89 Miss. 322, 42 So. 131 (1906); Clark v. Moyse, 48 So. 721 (Miss. 1909); and McFadden v. Buckley, 98 Miss. 28, 53 So. 351 (1910).

> "A summary of these latest cases, as well as of numerous others going back almost to the beginning of the judicial history of the state, is that: When all the testimony in behalf of a party litigant is taken as a whole and is considered as if undisputed by the other party, and that testimony is reconcilable in essential features with the material facts which are undisputed, and, when so reconciled, and taken together with the undisputed facts, is of such a real and substantial nature that impartial men of sound judgment could reasonably believe it, and prudently act thereon, and thence it furnishes a factual basis adequate to sustain the case of the party, a peremptory instruction should not be granted against him. But if the testimony in behalf of the party does not measure up to the established standard, it is insufficient and therefore is but a scintilla, as that term is to be understood in our law. . . .
>
> "Under the record we think that the case here was one in which the scintilla rule was properly applicable, and that the action of the trial judge in granting the peremptory instruction was correct."[44]

In saying that the case was one to which the scintilla rule was properly applicable,[45] the court obviously did not have reference to the rule that has been herein discussed as the scintilla rule. It seemingly adopted the view that the plaintiff's evidence, if it is so insufficient and unreasonable as to entitle the defendant to a peremptory instruction under the plaintiff's-evidence rule, is to be considered as no more than a scintilla; and that, since a scintilla of evidence will not support a verdict, a peremptory instruction for the defendant is proper.

The result reached is that the evidence of the plaintiff is to be considered as undisputed and, being so considered, must measure up to the standard imposed by the court. This standard is, in *Thomas v. Williamson* as in *Frizell v. White*[46] couched in general terms and furnishes no exact test, even to the judge. Because of the varying and unpredictable factual situations which will continually arise, no such test would be practical. All that can be definitely said is that the court has deemed it wise to empower the trial judge to determine whether the plaintiff could, upon the strength of his own evidence, have a meritorious cause of action. The trial judge is thus enabled to pass judgment on different cases without his discretion being limited by too many inflexible rules. The necessity for making this decision has been placed upon the judge, and he has to guide

[44]187 So. 220, 221 (Miss. 1939).

[45]Such terminology is apt to prove confusing, since in the earlier part of this decision and in at least two former ones the court expressly held that the scintilla rule is not in effect in this jurisdiction.

[46]27 Miss. 198 (1854).

him the propositions (1) that only the plaintiff's evidence is to be considered, (2) that there must be more than a scintilla of evidence tending to establish the plaintiff's case, and (3) that the evidence must be reasonably believable. It must be recognized that these propositions cannot in and of themselves offer the solution in any particular case, and that the decision will depend upon the reaction of the individual judge. This is necessarily true in all cases where the judge has to apply a standard instead of a rule. Of course these reactions will be conditioned by the typical training shared by the members of the legal profession of a particular time and place.

II. *For the Plaintiff*

Some jurisdictions adopt the view that a verdict cannot in any instance be directed for the party having the burden of proof.[47] This attitude is based on the theory that allowing the court to instruct peremptorily for the plaintiff necessarily permits the court to pass upon the credibility of the witnesses, thus infringing upon the province of the jury. Most jurisdictions, however, have recognized that a peremptory instruction for the plaintiff is sometimes proper.[48] Where the plaintiff's testimony has been so sufficinet as to satisfy the court that he had a meritorious case, and there was no rebuttal by the defendant, directed verdicts for the plaintiff have been allowed on the ground that the jury could not reasonably disbelieve reasonable and uncontradicted testimony.[49] Jurisdictions following the plaintiff's-evidence rule, the scintilla rule, or the new-trial rule can all consistently take this stand. *Stevens v. Stanley*[50] illustrates the attitude that the Mississippi court has taken on the question:

> "If, as we understand it to be contended by appellee, it is a rule of procedure in Iowa that the jury may disbelieve the most positive evidence, although it stands uncontradicted, we say that there is no such rule in Mississippi, but our rule is that the jury, as well as the judge, is bound by uncontradicted testimony, although, of course, oral testimony not otherwise contradicted may be opposed by physical facts or by the facts of common knowledge. The testimony of the appellant and his witnesses in this case is not

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[47]In Woodin v. Durfee, 46 Mich. 424, 9 N. W. 457, 458 (1881), the court says that " a jury may disbelieve the most positive evidence, even when it stands uncontradicted, and the judge cannot take from them their right of judgment."

[48]5 WIGMORE, EVIDENCE (2d ed. 1923) § 2495. For a competent general discussion, see Sunderland, *Directing Verdicts for Party Having Burden of Proof* (1913) 11 MICH L. REV. 198.

[49]Davis v. Wyskup, 97 Okl. 239, 223 Pac. 357 (1924).

[50]153 Miss. 809, 810, 122 So. 755 (1929). See also Mobile, J. & D. C. R. R. v. Jackson, 92 Miss. 517, 46 So. 142 (1908); Stewart v. Coleman & Co., 120 Miss. 28, 81 So. 653 (1919); Crichton v. Halliburton & Moore, 154 Miss. 265, 122 So. 200 (1929); Farrer v. Lindsey, 161 Miss. 379, 137 So. 93 (1931).

> contradicted by the countervailing direct testimony, nor by facts of universal, common knowledge. It is true, as contended, that there are certain facts in this case from which an inference of the want of *bona fides* is sought to be drawn, and it is true that, when a reasonable and well founded inference of a want of *bona fides* may be drawn, that it is a case for the jury and not for the court. But it is the duty of the court to guard the line between solidly substantiated direct inferences and those other conclusions which are not of this character, but are conjectures or suspicions, or else are inferences based solely upon other inferences. After a most anxious and mature reconsideration of this case, and every feature of it, we are constrained to the conclusion that the inferences of the want of *bona fides* are not sufficiently cogent to form the basis of an adverse judgment."

Therefore, if the plaintiff introduces testimony which the court thinks reasonably believable, and this testimony sufficiently establishes his case and is unrefuted by the defendant, the court can instruct peremptorily for the plaintiff.

Nevertheless, by saying that when a reasonable inference of a want of *bona fides* may be drawn, it "is a case for the jury and not for the court", the court intimates that in such a case the giving of a peremptory instruction for the plaintiff would be erroneous. Thus if a situation should arise in which the uncontradicted testimony of the plaintiff, though reasonably believable, at the same time admits of inferences which tend to render it reasonably unbelievable or otherwise to leave the court doubtful whether a peremptory instruction should be given, the court must submit the case to the jury.

Where, however, the defendant does offer refuting testimony, a more complicated situation is presented. Courts following the new-trial rule can easily and consistently avoid any difficulty by holding that a verdict for the plaintiff is proper in any case in which a verdict for the defendant would not be allowed to stand.[51] Those following the plaintiff's-evidence rule or the scintilla rule, however, cannot so easily transpose their test for deciding the propriety of a directed verdict for the defendant so as to make it serve in determining whether the plaintiff is entitled to a peremptory instruction. In applying the plaintiff's-evidence and the scintilla rules to determine whether a verdict may be directed for the defendant, the plaintiff's testimony is to be considered as if undisputed. This is accomplished by not hearing the defendant's testimony or by entirely excluding it from consideration. But in determining whether a directed verdict for the plaintiff is in order, the evidence of the defendant is considered in the light of the testimony adduced by the plaintiff, which has already been heard and considered. Therefore,

[51]Dutton v. Atlantic C. L. R. R., 104 S. C. 16, 88 S. E. 263 (1916).

accepting a defendant's testimony as undisputed involves complications which are not present when it is the evidence of the plaintiff that is to be solely examined.

Nevertheless, the Mississippi court has always treated the question of peremptory instructions as if the test to be applied is the same, regardless of whether the party moving for the directed verdict is the plaintiff or the defendant. In *Holmes v. Simon*[52] the court says:

> "The peremptory instruction should not have been given. When the evidence is sufficient to warrant a verdict for the plaintiff (or other party) in any view of it which might be legally taken, a peremptory instruction to find for the other party cannot properly be given."

Again in *McCaughn v. Young*:[53]

> "It is well settled in our state that where a peremptory instruction is given, the losing party is entitled, upon the review of the action by the court, to have all facts in his favor considered as true. A peremptory instruction is proper only in cases where, with all the facts in evidence taken as true with every inference from them, they fail to maintain the issue."

Thus, although the court has not been consistent in giving the test to be employed in determining whether a peremptory instruction is proper, it has been consistent in recognizing that the rule given is to be applied irrespective of which party has asked for the directed verdict.

Since, therefore, the court has adopted the plaintiff's-evidence rule and has in *Thomas v. Williamson*[54] reasserted that the procedure in determining whether a peremptory instruction should be given is the same, regardless of the identity of the party moving for the directed verdict, it is necessary to determine how the plaintiff's-evidence rule can be transposed so as to work practically when the plaintiff has asked that a verdict be directed in his favor.

As was held in *Stevens v. Stanley*,[55] when the plaintiff reasonably establishes his case, his testimony is taken as true if not rebutted by the defendant. Therefore, the defendant must refute the plaintiff's testimony or risk having a verdict directed against

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[52]71 Miss. 245, 246, 15 So. 70 (1893).

[53]85 Miss. 277, 286, 37 So. 839, 840 (1904). See also Whitney v. Cook, 53 Miss. 551 (1876); Mississippi & Yazoo River Packet Co. v. Edwards, 62 Miss. 534 (1885); McFadden v. Buckley, 98 Miss. 28, 53 So. 351 (1910); Lee County Gin Co. v. Middlebrooks, 161 Miss. 422, 137 So. 108 (1931).

[54]187 So. 220 (Miss. 1939).

[55]153 Miss. 809, 122 So. 755 (1929) cited *supra* note 50.

him. On the other hand, since the assumption of the truth of the plaintiff's evidence is based upon the defendant's failure to refute, if the defendant does refute, no such assumption can be made; and in the ordinary case the jury decides whether the refuted testimony of the plaintiff is true. If, however, the plaintiff asks for a peremptory instruction, all of his testimony which has been rebutted must be considered as untrue; and if, in the absence of this evidence, he has failed to establish his case, a peremptory instruction cannot be given and the issue must be submitted to the jury. But the holdings that the evidence upon which a verdict is based must be reasonably believable suggests that the plaintiff's testimony will be considered as true if the defendant does not offer some testimony in rebuttal which the jury could "reasonably" believe and "prudently" act upon.[56]

Therefore, if the plaintiff's case is sufficiently substantial to entitle him to reach the jury, the defendant must offer in rebuttal testimony which the court considers reasonably believable.[57] Since the court has already heard the plaintiff's testimony and has to consider it in determining whether the rebutting evidence introduced by the defendant is relevant, the court will probably find it difficult not to determine whether the defendant's evidence is reasonably believable in the light of the rebutted testimony of the plaintiff. Theoretically, however, the court is to consider the defendant's evidence as undisputed and judge it on its own merits entirely.[58]

Stanny Sanders

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[56]In those jurisdictions following the scintilla rule, the defendant would have to introduce no more than a mere "spark" or a "glimmer" of evidence.

[57]In cases where the plaintiff has made out a *prima facie* case he is evidently considered as having established such a case as to require the defendant to reasonably overcome it or have a verdict directed against him. If the defendant does successfully overcome the case against him, however, and the plaintiff cannot otherwise establish liability, the defendant is entitled to a peremptory instruction. It seems therefore, that in this type of case the defendant's testimony is necessarily considered in determining whether he is entitled to a peremptory instruction. But, theoretically, after the plaintiff's *prima facie* case has been met and he has no evidence proving the defendant's liability, it could be said that the directed verdict for the defendant is proper because of the insufficiency of the plaintiff's testimony.

Also, if the defendant makes an affirmative defense with testimony which meets the requirements that the court puts upon the evidence of the party having the burden of proof, there is no logical reason why this testimony should not be considered in determining whether the defendant is entitled to a peremptory instruction. Such a defense should throw upon the plaintiff the necessity of offering in reply substantial and reasonable testimony. This of course, would not obtain in those jurisdictions which follow the scintilla or plaintiff's evidence rule and adhere also to the rule that a verdict cannot be directed for the party having the burden of proof.

[58]This discussion has not dealt with the question of when or how a motion for a peremptory instruction must be made. It is to be remembered, however, that before a verdict can be directed in any case, the motion for a peremptory instruction must be made during the trial of the cause. The Supreme Court cannot decide for a party on the ground that he was entitled to a peremptory instruction unless that party properly made his motion for a directed verdict

The Conflict of Laws of the Descent and Distribution of Property Located in Mississippi

Mississippi and Illinois apply their own statutes of descent and distribution to all locally situate property of a foreign-domiciled decedent, whether that property is real or personal, movable or immovable, tangible or intangible. For that reason, a recent decision of the Louisiana Court of Appeals[1] is of importance in those two states, although it is, of course, important in all states where a decedent's immovable property is situate.

The problem here discussed may be briefly summarized as follows:

A married man dies domiciled in state *X* leaving property situate in state *X* and other property situate in state *Y*. He is survived by a widow and one child. The statute of descent and distribution of *X* provides that the widow shall take one-third and the child two-thirds of the estate of the decedent, while the statute of *Y* provides that the widow shall take one-half and the child one-half. Will the court of state *Y* so distribute the locally situate property that the widow will get one-half thereof, or so that she will get as nearly as possible one-half of the entire estate?

Jarel v. Moon's Succession[2] contains the Louisiana answer to this problem. In that case, Mrs. Mary K. Moon died domiciled in Iowa, leaving an estate valued at over $9,000 of which she bequeathed $1,000 to plaintiff, her only surviving child. Plaintiff sued to get possession as owner of her mother's land in Louisiana valued at $500, or in the alternative, for one-third of the value. She claimed under a Louisiana statute providing that "Donations inter vivos or mortis causa cannot exceed two-thirds of the property of the disposer, if he leaves at his decease, a legitimate child."[3] Her theory was that she was entitled to $3,000 under the Louisiana statute, that she had received only $1,000 and that Louisiana should give her as much of the balance as it was able. The trial court denied her suit; and the decision was affirmed.

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in the court below. See City of Clarksdale v. Fitzgerald, 187 So. 533 (Miss. 1939). But if the motion was properly made and erroneously denied, the Supreme court can render judgment, even if the jury found in favor of the party whose evidence was insufficient. See, *e. g.*, Stevens v. Stanley, 121 So. 814 (Miss. 1929); Mutual Ben. Health and Accident Ass'n. v. Johnson, 186 So. 297 (Miss. 1939).

An interesting case in this connection is Hill v. Johnsone-Cone Brick Co., 168 Miss. 452, 151 So. 721 (1933). The plaintiff was allowed to take a voluntary nonsuit after the court had stated that it would grant the defendant's motion for a peremptory instruction. For a detailed discussion of this case, see Comment (1938) 10 Miss. L. J. 327.

[1]Jarel v. Moon's Succession, 190 So. 867 (La. App. 1939).

[2]*Ibid.*

[3]La. Rev. Civ. Code (Merrick, 1925) Art. 1493.

The Court of Appeals offered two grounds for denying relief. First, that to grant relief would be regulating the entire succession; and second, that it would lead to a "dilemma—as we would find courts in whatever states the property of the deceased was found attempting to administer the entire estate of the deceased."

The Court's reasoning appears to proceed in five steps.

(1) The law of the situs, Louisiana, governs the succession of the land there.[4]

(2) This law provides that (a) "Persons who reside out of the State, cannot dispose of the property they possess here, in a manner different from that prescribed by its [our] laws"[5] and (b) "when a person dies, leaving property in two or more states, his property in each state is—for the purpose of its administration—considered as a separate succession."[6]

(3) To have given the plaintiff all the land in Louisiana would have been an "attempt to regulate the entire succession . . . The courts of this state are interested in the dispositions of a non-resident testator's will only as it affects immovable property located in this State."[7]

(4) "Any attempt on the part of the court to do otherwise [*i.e.*, otherwise than to refuse relief] would necessarily lead to a dilemma, as we would find courts in whatever states the property of the deceased was found, attempting to administer the entire estate of the deceased."[8] There seems to be three steps in this "dilemma": (a) To grant relief would be an attempt to regulate the entire succession. (b) Other states would attempt to regulate the entire succession. (c) The accomplishing of either attempt would result in an undesirable situation involving retaliation.

(5) "The plaintiff in this action was left a bequest exceeding the value of the property situated in Louisiana . . . As far as the property located in this state was concerned, the plaintiff was not aggrieved, as she received a far greater amount than the one-third reserved to her under the laws of this state. The action must therefore be dismissed."[9]

It is submitted that the decision is illogical and inconsistent; that the Court of Appeals mistook a chimera for a dilemma and that it adopted the course which most surely involved the difficulties it was seeking to avoid. Let us take the court's reasoning step by step.

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[4] 1 BEALE, CONFLICT OF LAWS (1935) § 101.1; RESTATEMENT, CONFLICT OF LAWS (1934) § 249.
[5] LA. REV. CIV. CODE (Merrick, 1925) Art. 491.
[6] See *In re* Estate of Frances Parke Lewis, 39 La. App. 241 (1880).
[7] Jarel v. Moon's Succession, 190 So. 867, 869 (La. App. 1939).
[8] *Ibid.*
[9] *Ibid.*

No one quarrels with the rule that the local law governs the succession of land.[10] Furthermore, it is the law of Louisiana that the land located there is to be looked at for the purposes of administration as a separate succession.[11]

The trouble seems to be that this doctrine was not applied. It was a violation of the state's policy to regard the entire succession for the purpose of determining whether the plaintiff was entitled to any of the land in Louisiana. Yet, that was what was done; and this is the crux of the whole matter.

The interpretation of the phrase, "separate succession" is vital to the determination of this case. There were at least three interpretations open to the court. It could have decided that this situation gave rise to an exception to the general rule; or it could have decided that although the rule was applicable, the application of the said rule did not entitle the plaintiff to recovery. This the court did. It could have interpreted the words literally. Under this view, the plaintiff would be entitled to one-third of the real property located in Louisiana. This attitude would seem to be more in accord with the probable meaning of the statute. It would be simpler, more practical, easier of application and certainly would not have involved an attempt to distribute the entire succession.

Again, the court could have regarded the land in Louisiana as a "separate succession" in the sense that it could dispose of that land as if all the property of the deceased had been located there. This was what the court evidently feared it would be doing by granting relief; but, as shall be pointed out later, this was not the effect of granting the relief of the one-third of the property in Louisiana.

To have adopted this third alternative and to have given the plaintiff all the property in Louisiana would have been a violation of the rule that it would not distribute the entire estate in the sense that it would have been viewing the entire estate for the purpose of discovering how much was due the plaintiff and then distributing local land in a manner which would, as far as possible, give the plaintiff the proportion of the total estate which, according to the local policy, she should have. This would have been more understandable from the standpoint of the local law than what was done.

In its evident attempt to avoid a dilemma, the court seemed by its decision to impale itself unsuspectingly upon another dilemma and to regulate the entire succession, in the sense of denying its policy by looking at the entire estate and not confining its attention to its own land as a separate succession.

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[10]In 1 BEALE *loc. cit. supra* note 4, it is said that ". . . a state may exercise through its courts jurisdiction over the land within the state for any purpose." The RESTATEMENT, CONFLICT OF LAWS (1934) § 249 is authority for the doctrine that "the validity and effect of a will of an interest in land is determined by the law of the state where the land is."

[11]See *In re* Estate of Frances Parke Lewis, 39 La. App. 241 (1880).

It is to be observed that in the fourth step of the court's reasoning it refused to give the plaintiff full relief on the ground that to do so would involve a dilemma and that to give full relief would be attempting to regulate the entire succession which would lead to conflict with other jurisdictions.

The dilemma under contemplation probably was that none of the states in which property was located could dispose of its property without seeing how much the plaintiff had gotten elsewhere without doing a shadowy sort of wrong to another jurisdiction in which property of the deceased was located. *Sed quaere*: Where the statute is limited in its application to the prescribed percentage of the local land, what concern is it of another state? This is not a situation analogous to governmental confiscation of local lands owned by foreigners, but is a case apportioning property among certain almost equally entitled claimants for the real property of the deceased, as to each of whom it would be in the nature of a gift. The likelihood of reprisals or reciprocal barriers is slight. What state is more vitally concerned than that in which the land is located? Louisiana has a strong policy in favor of protecting the children of a decedent and the Court of Appeals should give effect to it.

After refusing relief in full because it would be regulating the entire succession, this decision denied the alternative relief on the grounds, not that it would be regulating the entire succession, but, on the grounds that the plaintiff had already received more than the amount to which she was entitled in Louisiana. This is a sudden shifting to a different and inconsistent basis for adjudication. Where recovery in full was denied the basis of the decision was avoidance of regulation of the entire succession. Where recovery in the alternative was denied the basis of the decision was that the succession outside of Louisiana regulated the entire succession to deny any recovery in Louisiana. Thus local deferred to foreign policy. This is a refusal on the part of the court to recognize in its legislature a right which it permits a foreign will to assert and presents the true dilemma of gratifying the policy of a foreign state on the one hand and denying the local policy on the other.

Why wasn't the rule of not regulating the entire estate applied to determine whether the plaintiff was entitled to the alternative remedy of one-third the value of the land? Instead, some other rule was applied. If the land in Louisiana is to be regarded as a separate succession, there can be only one logical answer to the question of whether the plaintiff is entitled to one-third of that land. Otherwise, the unanswerable difficulties envisaged in this opinion are encountered.

In re *Freeman's Appeal*[12] furnishes an analogy from a Connecticut court to support the plaintiff's contention. There a married

[12]68 Conn. 533, 37 Atl. 420 (1897).

woman was not allowed to overcome her Connecticut disability of coverture by getting her husband to make a contract for her in her own name in another state. The court said that what she could not do herself she could not get her husband to do for her. No state should allow the variant policy of other states to supersede strong local policy in matters of primarily local interest. This attitude of resentment towards interference with the local law is repeated in the words of the principal case, "Persons who reside out of the State cannot dispose of the property they possess here, in a manner different from that prescribed by its [our] laws."[13] A foreign domiciliary should not be allowed to dispose of her land in Louisiana in a manner different from that in which she could have disposed of it had she been domiciled in Louisiana. Effect should have been given to that state's policy. Thereby, the plaintiff would have been allowed at least partial recovery and might well have been entitled to full recovery.

What are the possible effects of this case upon the succession of property in Mississippi? By statute in Mississippi in case of intestacy a spouse gets a child's portion of the estate of the deceased.[14] In case of testacy, a spouse may renounce and claim as under intestacy, but he or she will be limited to one-half of the estate of the deceased even though there are no children.[15] If there is no provision for a spouse in the will, he or she may claim as in the case of an unsatisfactory provision—thereby becoming entitled to a child's share but limited to one-half the estate even in case there are no children.[16] The descent of both realty and personalty in Mississippi is governed by the law of Mississippi.[17] There is an exception, however, which would limit the effect of the statute of distributions regarding personalty to its operation upon the estates of intestates.[18] That exception would seem to be limited to cases where original probate at the domicil and renunciation by the survivor there has the effect of requiring the distribution of personalty in Mississippi under the laws of intestacy of the state of the domicil.[19]

This limitation derives from a later case[20] which holds that where a wife dies domiciled in Tennessee with the bulk of her realty and personalty in Mississippi, upon original probate in Mississippi the husband may elect to renounce the will under the laws of Missis-

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[13]Jarel v. Moon's Succession, 190 So. 867, 868 (La. App. 1939).
[14]Miss. Code Ann. (1930) § 1404.
[15]Miss. Code Ann. (1930) § 3561.
[16]Miss. Code Ann. (1930) § 3562.
[17]Miss. Code Ann. (1930) §§ 1401, 1402. Neblett v. Neblett, 112 Miss. 550, 73 So. 575 (1916) (lease in 16th section Mississippi land held personalty and distributable under the laws of Mississippi); Richardson v. Neblett, 122 Miss. 723, 84 So. 695 (1920) (Ann Neblett's interest in section 16 was a chattel "nevertheless, . . . it descended directly to her heirs and vested in them to the same extent as did the land owned by her in fee.").
[18]Slaughter v. Garland, 40 Miss. 172 (1866).
[19]*Ibid.*
[20]Bolton v. Barnett, 193 Miss. 801, 95 So. 721, 725 (1923).

sippi in spite of the fact that Tennessee does not allow such renunciation; and that the law of distribution in Mississippi governs the descent and distribution of personalty and realty after renunciation.

What, then, would be the effect of a foreign statute of descent and distribution upon the property of the decedent in Mississippi in this situation: Suppose a husband dies intestate in Virginia leaving a widow and one child. His entire estate is valued at $9,000. For convenience, let us say that all of it is personalty. The property in Virginia is valued at $6,000; and that in Mississippi, at $3,000. The law of Virginia gives the widow statutory dower or one-third and the child gets two-thirds. The law of Mississippi makes them share equally. After the child has received $4,000 in Virginia, is Mississippi going to give it $1,500, which is one-half of the estate in Mississippi,or $500, which with the $4,000 the child has already received amounts to half of the entire estate of the deceased? Or, is Mississippi going to give the wife nothing, on the grounds that she has already received more than we would give her, or $1,500 or $2,500? The danger of the rule laid down in the principal case seems to be that inasmuch as both Louisiana and Mississippi have what amounts to distribution in accordance with the law of their own state, Louisiana calling it "separate succession"[21] and Mississippi "according to the laws of this state"[22], Mississippi might extend the Louisiana holding to a case of intestacy and deprive the wife of any personalty here on the grounds that as she has already received $2,000 and is entitled only to $1,500, she can't receive any more. The simplest and more desirable rule seems to be one which would give the wife that fractional part of the personalty located here that would be hers under the statute of descent and distribution in Mississippi, without looking at the laws or property outside of Mississippi.

In the case of realty, plainly the law of Mississippi as to the descent and distribution governs and the Mississippi realty will be considered totally independently of any other property there may be in any other state.[23]

The problem as to whether the law of the locus or that of the domicil applies, may arise in a number of ways. Whether it arises in the case of intestacy, partial intestacy, renunciation of an unsatisfactory will and whether the property is realty or personalty, or both, where the legislative policy gives precedence to the local law, no rule of judicial legislation should be permitted to defeat that policy. Accordingly, where the local statute says one-half, the beneficiary should receive one-half of the local property; and where it says one-third, he should receive one-third of the property there

[21]See *In re* Estate of Frances Parke Lewis, 39 La. App. 241 (1880); Jarel v. Moon's Succession, 190 So. 867, 869 (La. App. 1939).
[22]Wilson v. Cox, 49 Miss. 539 (1873).
[23]Miss. Code Ann. (1930) § 1401.

located. In such a situation the letter of the local statute seems to be in greater consonance with the spirit of the proper law of the forum than does the foreign rule of descent and distribution.

There were three alternatives in the principal case: to give the plaintiff nothing, one-third, or all she requested. In selecting among the three alternatives, the possibility of reprisals by states which have adopted the majority rule that the law of the domicil governs the distribution of personalty and movable property must be considered.

If the Louisiana solution is adopted there is, of course, no danger of reprisals as that court abandoned its own state's policy as declared by statute and yielded in advance to the policy of the domicil of the decedent.[24]

If the alternative which comprises an attempt to distribute the local property in such manner as to give to the various claimants as nearly as possible the proportion of the total estate which the local policy prescribes be chosen, there may be a real danger of reprisal. The choice of this alternative represents, not merely a disregard for foreign policies, but a disapproval reflected in a positive attempt to nullify them. It seems even probable that this attempted nullification will cause other states to insist upon the propriety of their policies to the point of distributing the movable property of Mississippi domiciliaries, which may happen to be located outside of Mississippi, in accordance with the statutes of the situs, rather than in accordance with the statutes of the Mississippi domiciled decedent.[25] This may occur even if the adoption of such a doctrine entails abandonment of the normal choice of law rule of the situs by way of negative comity for the purpose of reprisal.[26]

[24]It is very unusual to find a state yielding to the domicil in cases where local immovable property is concerned. The strength of the policy leading to application of purely local law to immovable property has had nearly universal application, as well in the countries under the civil law as in the common law jurisdictions.

[25]The fact that only two states, Mississippi and Illinois, have adopted the rule which selects the law of the situs of movable property as that to be applied to determine distribution makes the danger of reprisals an important consideration. The importance thereof, however, is somewhat decreased by the probability that the movable property of a decedent is situate at his domicil.

[26]An example of such reprisal may be found in the doctrine of Arizona with respect to the transfer in Texas of property under a chattel mortgage, as established in Forgan v. Bainbridge, 34 Ariz. 408, 274 Pac. 155 (1928). The normal doctrine of Arizona is that the validity of transfers of personal property is to be determined by the law of the state in which the transfer occurred. In order to protect Arizona lienors from the operation of the Texas rule as to the destruction of foreign liens by transfers of the property in Texas, the former state refuses to recognize the validity of the Texas transfer in so far as it cuts off the interests of the lienor. ". . . when a sister state does not recognize and will not enforce in her courts our rule of law in regard to a certain class of contracts [chattel mortgages] having their inception in this state, we are not required under the doctrine of comity to enforce similar contracts according to her rule, when such rule is directly opposed to our public policy." Forgan v. Bainbridge, *supra*, 274 Pac. at 158.

If the alternative which comprises distribution of the movable property situate in Mississippi as if it constituted a totally independent decedent estate be chosen, there is much less danger of reprisals by other states in which the rest of the estate may be situate, or in which all or a part of the estate of a Mississippi domiciliary may be situate. This is the traditional method of determining the descent of immovable property and, as such, has never led to reprisal.

So long, then, as the policy of Mississippi continues to be that enacted in Section 1401, Code of 1930, the method of distribution which will subserve the declared policy without grave danger of reprisal is that which treats the property situate in Mississippi as if it were a totally independent estate.[27] In accordance with this view, all property situate in Mississippi, whether real or personal, tangible or intangible, movable or immovable, testate or intestate will descend and be distributed as directed by the statutes of Mississippi without consideration of any foreign law or fact.

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The principal of negative reciprocity is illustrated by Union Securities Co. v. Adams, 33 Wyo. 45, 236 Pac. 513 (1925), which holds that where Texas allows a bona fide purchaser or attaching creditor to cut off a lienor that Wyoming will deny its ordinary rule of conflict of laws which would hold the lienor's interest paramount and will terminate the interest of the Texas lienor in favor of a Wyoming bona fide purchaser or attaching creditor.

Another example is to be found in the doctrine that the basis for a foreign judgment, as distinguished from the jurisdiction of the foreign court, will be examined only if the courts of the nation where the judgment was rendered will examine the basis of American judgments. Compare Hilton v. Guyot, 159 U. S. 113 (1895) (merits of French judgment examined upon the ground that French courts examine the merits of American judgments, and recognition of the finality of the French judgment denied), with Ritchie v. McMullen, 159 U. S. 235 (1895) (Canadian judgment given conclusive effect because Canadian courts give like effect to American judgments).

[27]It may well be that recognition of the desirability of uniform distribution of the estates of decedents should lead to repeal of this section of the code. As pointed out in STUMBERG, CONFLICT OF LAWS (1937) 380, all but two of these states have felt that this uniformity was more important in matters of succession to personal property than local policies as to ownership of such property.

RECENT DECISIONS

CONTRACTS—OFFER OF UNILATERAL CONTRACT DISTINGUISHED FROM UNILATERAL AND BILATERAL CONTRACT—EFFECT OF BEGINNING ACCEPTANCE OF OFFER OF UNILATERAL CONTRACT.

Upon certain conditions not material here, defendant's intestate, an aged woman, promised plaintiff (a "Home for Aged Women") that if she should "continue to be" an inmate of the Home until her death, that she would then pay a certain sum of money to plaintiff. The plaintiff made no express promise to care for defendant's intestate, but did "admit" her to the home and cared for her until her death. Plaintiff sued to collect the sum of money. HELD: That the plaintiff should recover. *Wright v. Mary Galloway Home for Aged Women*, 187 So. 752. (Miss. 1939).

While the result reached is obviously correct and desirable, it is submitted that the language used by the court is confusing and inaccurate. The court said:

"It is argued . . . that the contract was unilateral—that there was no reciprocal promise on the part of the Home, and, therefore, it had no binding force on her. It is true that the *contract was unilateral in its inception. It became bilateral*, however, *because of its performance* on the part of the Home. In other words, Mrs. McClain's promise was met by the Home with performance. Consideration for a promise may be 'an act other than a promise'. Rest. Law, Contracts, Sec. 75."[1]

The court is obviously and quite properly treating Mrs. McClain's promise to pay *"if she continues to be an inmate until her death,"* as if she had said, "I promise to pay if you will care for me as an inmate until my death, with no obligation on my part to remain an inmate."

Defendant's contention, that the promise to pay for services if rendered was unenforceable because it was "unilateral", should have been answered by the simple statement that "the recognition of unilateral contracts by the law antedated the recognition of bilateral contracts by about a century[2] and that bilateral contracts were first recognized about the end of the sixteenth century."[3]

And to say that the promise to pay is not binding, because there was no "reciprocal promise" is but another way of exhuming the idea that where there is no "mutuality of obligation", there is no contract. Payees of promissory notes are in no way obligated or bound to the makers, but it is hoped that no court would release the maker from liability because the payee had given no "reciprocal promise" but had only performed some requested service for the maker.

The idea is well expressed by Williston:

"It is often stated, as if it were a requisite in the formation of contracts, that there must be *mutuality*. This form of statement is likely to cause confusion, and, however limited, is at best an unnecessary way of stating that there must

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[1] 187 So. 752, 754 (Miss. 1939). (Italics added).
[2] 1 WILLISTON, CONTRACTS (rev. ed. 1936) § 13.
[3] 1 WILLISTON, CONTRACTS § 103; Strangborough v. Warner, 4 Leo. 3, 74 Eng. Rep. 686 (K. B. 1589); Gower v. Capper, Cro. Eliz. 543, 78 Eng. Rep. 788 (K. B. 1597); Nichols v. Raynbred, Hob. 88, 80 Eng. Rep. 238 (K. B. 1615).

be valid consideration. *In unilateral contracts there is never mutuality of obligation.* . . . to express the idea by saying that mutuality is necessary is sure to cause confusion with the use of the same word by courts of equity. *Lack of mutuality,* as that phrase is used by courts of equity, *is not necessarily any objection to the existence of a contract.*"[4]

The *Restatement of Contracts* defines a contract as "*a promise,* . . . the performance of which the law in some way recognizes as a duty",[5] and in the comment to the same section it is stated that "a contract may consist of a *single promise by one person to another,* or of mutual promises by two persons to one another." Section 6 classifies *contracts* as "unilateral or bilateral". Unilateral contracts, then, since all contracts are promises which the law will enforce, are just as enforceable as are bilateral contracts. In *Williston on Contracts,* it is said:

"A vital distinction in *contracts* exists between (1) those where each party promises some performance and (2) *those where only one party promises performance,* the consideration from the promisee being *actually given* and being something other than a promise. The former are called bilateral, the latter unilateral."[6]

In the instant case, the only promise that was made was Mrs. McClain's promise to pay upon the performance of the acts of taking care of her for the rest of her life. This was an *offer* of a unilateral contract, which would ripen into a unilateral contractual obligation only upon the performance of those acts. This was not the "inception" of the contract, any more than the offer in a bilateral contract is the "inception" of the contract. There was no contract at all in the instant case until that offer was accepted and the only way in which it could be accepted was by performance of those acts. Upon the making of the promise by Mrs. McClain, no one was bound; the Home was not bound to take care of her and Mrs. McClain was not bound to pay. There was simply an *offer* of a unilateral contract.

For the court to say that the contract was "unilateral in its inception" is misleading. It was unilateral not only in its inception, but throughout its entire span of life, until discharged by performance through payment by Mrs. McClain's estate, when it became an executed unilateral contract. In its "inception" there was an *offer of a unilateral contract* which, upon acceptance by performance on the part of the offeree, became a *unilateral contract.*

For the court in the instant case to say that a contract, *unilateral* in its inception, became *bilateral* by performance *on the part of the Home,* is at least inaccurate. There never was any contract which the Home *could* perform. There were requested acts which they were under no contractual duty to perform, but which they could perform and thereby create a contract, which the offeror would be forced to perform. A unilateral contract never becomes a bilateral contract, except in the sense hereinafter mentioned.

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[4] 1 WILLISTON, CONTRACTS § 141. (Italics added).
[5] 1 RESTATEMENT, CONTRACTS (1932) § 1.
[6] 1 WILLISTON, CONTRACTS § 13. (Italics added).

In the famous case of *Brackenbury v. Hodgkin*,[7] the distinction between *offers* of unilateral contracts, and unilateral and bilateral contracts is clearly made, where it is said:

"A legal and binding contract is clearly proven. . . . The offer was the basis, not of a bilateral contract, requiring a reciprocal promise, a promise for a promise, but of a unilateral contract requiring an act for a promise. In the latter case the only acceptance of the offer that is necessary is the performance of the act. In other words, the promise becomes binding when the act is performed. 6 R. C. L. p. 607, § 30.[8] This is elementary law."

The court in the instant case, by its language, at least leaves the impression that unilateral contracts are unenforceable and that only bilateral contracts are enforceable. This idea seems to prevail among a number of courts and is accounted for only by a misconception as to the meaning of the term "unilateral", when used in this connection. Since the word means "one-sided", a number of courts have assumed that the term means "having only one party". This accounts for such ridiculous statements as those found in the footnotes to the chapter on Contracts in *Corpus Juris Secundum*[9] where cases are cited as holding that: "a contract requires an agreement between two or more parties . . . so that the term unilateral contract is a misnomer";[10] that to make a contract unilateral and thereby *void*, there must be no mutuality of obligation, and only one party thereto must be bound thereby;"[11] and that "in a strict sense a contract is unilateral and *unenforceable*, when one party is bound and the other is not, or when one party gets something and the other nothing."[12] It is difficult to understand how either party could be bound under a *void* or *unenforceable* contract in the sense there used.

That the term "unilateral contract" does not mean "*having only one party*", but instead means "*having only one party bound*" is clearly shown in the *Restatement of Contracts*, where is is said: "There must always be at least two parties to a contract, whether unilateral or bilateral, and there must usually be an expression of assent by each. In many cases, however, a promise becomes a contract even though no return promise is made by the promisee. In such cases the *legal duty* is unilateral, resting on the promisor alone. The correlative *legal right* is also unilateral, being possessed by the promisee alone. The statement often made that unless both parties are bound neither is bound is quite erroneous, as a universal statement. A unilateral contract is in a very real sense, as its name implies, a one-sided contract. There are two parties to the contract, it is true, and a manifestation of assent on the part of each is usually

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[7]116 Me. 399, 102 Atl. 106, 107 (1917).

[8]A reference to this identical citation from R. C. L. was made with approval in Murphree v. National Life & Accident Co., 168 Miss. 667, 677, 151 So. 748 (1934) where Griffith, J. said: "There is a distinction between an offer which asks that the offeree *promise* to do something, and an offer which proposes that the offeree shall *do* something; in the latter case the performance of the act at the time and in the manner prescribed by the offer completes the contract . . . 6 R. C. L. p. 607, § 30." (Italics added).

[9]17 C. J. S. p. 327, § 8, ns. 34, 35.

[10]Railsbach v. Raines, 110 Kan. 220, 203 Pac. 687 (1922).

[11]Hirsch & Sons Iron & Rail Co. v. Paragould & M. R. R., 148 Mo. App. 173, 127 S. W. 623 (1910). (Italics added).

[12]Lowery Lock Co. v. Wright, 154 Ga. 867, 115 S. E. 801, 804 (1923). (Italics added).

necessary to its formation; but one of the requisites for making the contract should not be confused with the contract itself. The contract is merely the promise, not the mutual manifestation of assent or the consideration paid for the promise."[13]

Sometimes it is said that after performance by the offeree of the acts requested, in an offer of a unilateral contract, has *begun*, the transaction in certain respects takes on the nature of a bilateral contract, in that after beginning performance of the requested acts the performer, sometimes, impliedly promises to continue to use his best efforts to complete performance and the offeror sometimes impliedly promises not to do anything that will make it impossible or difficult for the offeree to perform the requested acts. In that sense *beginning* performance of the act or acts requested in an offer of a unilateral contract is sometimes said to create a *subsidiary* bilateral contract, binding on the part of the offeror in the sense that he cannot revoke until after a reasonable time for performance has expired and binding on the offeree in that after beginning he must complete performance. But completed performance, such as taking care of Mrs. McClain until her death, never turns an offer of a unilateral contract, or a unilateral contract, into a bilateral contract.

John H. Fox, Jr.

EVIDENCE—ADMISSIBILITY OF EVIDENCE ILLEGALLY OBTAINED—ADMISSIONS MADE DURING COURSE OF ILLEGAL SEARCH.

Appellant was convicted of knowingly receiving stolen goods. A substantial part of the testimony upon which he was convicted consisted of statements voluntarily made by him to police officers during the course of an illegal search of his house.[1] He appealed upon the ground that evidence of his statements should have been excluded under the rule that evidence obtained by officers during the course of an illegal search is inadmissible. HELD: The admission of the evidence was not error. *Quan v. State*, 188 So. 568 (Miss. 1939).

Only one case directly in point with the instant case has been found. In *Milbourn v. State*[2] the Indiana Supreme Court had the identical question, and reached the same result as the Mississippi court. That court, however, attacked the problem from a different angle. It was there decided that the question was one of violation of the privilege against self-incrimination as guaranteed by the Constitution, and that the result depended upon whether or not the illegal search constituted sufficient duress to impair the free and voluntary nature of the admission and thus destroy its admissibility. The Mississippi court treated

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[13] 1 RESTATEMENT, CONTRACTS (1932) § 12, comments *b* and *c*. (Italics added). For another clear statement of the nature and definition of unilateral contracts, see 12 AM. JUR. p. 506, § 8.

[1] The warrant authorizing the search was void because of an error in the date.

[2] 212 Ind. 161, 8 N. E. (2d) 985 (1937), "The Constitutional provision protecting the citizen in his person, house, papers etc. against search or seizure without warrant is different and distinct from the provisions protecting him against being required to give evidence against himself. The confession or admission of guilt was obtained, not through the search warrant but through voluntary answers to questions. The officer had the right to question him anywhere but the appellant was not required to answer."

a similar set of facts as illegally obtained evidence. The deciding factor in the conclusion being the question of essential connection between the illegal search and the statements, it concluded that the defendant was under no duty to talk and that when he spoke voluntarily this speaking was separate and distinct from the search and there was no essential connection between the two.

Now assume that the Indiana court should decide that some future illegal search produces sufficient fear in the mind of a particular criminal defendant so that the fear produces the confession thus constituting a violation of the Constitutional protection against forced self-incrimination. Under this reasoning such a confession would be inadmissible. Likewise assume that the Mississippi court says there is an essential connection between some future illegal search and the admission or confession; certainly again the two courts will reach the same conclusion for Mississippi would not allow this evidence.

Thus it is apparent that both courts will reach the same result under identical circumstances though they use a different line of reasoning in reaching that result. If it is true that the fact of search produces sufficient fear so that there is unconstitutional duress in such a situation, then it seems clear that there is an essential connection between the fact of search and the admission.

Irrespective of the probable identity of results under either approach, the fact that the Mississippi court treated the instant case as one of illegally obtained evidence is significant, for it is to be noted that Mississippi follows the minority rule to the effect that evidence illegally obtained by a police officer is inadmissible against a criminal defendant.[3] This rule was laid down by the Supreme Court of Mississippi in 1922 in the case of *Tucker v. State*.[4] One year later in *Owens v. State*[5] this decision was followed by a divided court.[6] Three judges favored application of the rule in all situations. Two judges believed that the rule was good law, but felt that it should not be applied in a case where possession of the property in question is itself a crime and the police officer thus actually sees a crime being committed in his presence. These two judges thought that the *Tucker* case should have been overruled as an improper application of a proper rule; but since a majority of the court would not agree to overruling it, they specially concurred. Smith, J., dissented in a vigorous opinion.

[3]The United States Supreme Court, all of the subordinate Federal Courts, and nineteen of the State Courts of last resort have followed the doctrine of the United States Supreme Court as announced in Boyd v. United States, 116 U. S. 619 (1886), and subsequent cases refuse, subject to certain restrictions and limitations, to admit evidence obtained during an illegal search and seizure. Those courts which have aligned themselves with the Federal Courts on this doctrine are, Fla., Idaho, Ill., Ind., Ky., Md., Mich., Miss. [Owens v. State, 133 Miss. 753, 98 So. 233 (1923); State v. Patterson, 130 Miss. 680, 92 So. 96 (1922); Spears v. State, 99 So. 361 (Miss. 1924) holding that objection made at trial does not come too late; Tucker v. State, 128 Miss. 211, 90 So. 845 (1922) where authorities were reviewed and the doctrine reaffirmed; Pringle v. State, 108 Miss. 802, 67 So. 455 (1914)]; Mo., Mont., Okla., Ore., Tenn., Texas, Vt., Wash., W. Va., Wisc., and Wyo. The authorities are collected and classified in CORNELIUS, THE LAW OF SEARCH AND SEIZURE (2d ed. 1930) § 7.

[4]128 Miss. 211, 90 So. 845 (1922).

[5]133 Miss. 753, 98 So. 233 (1923).

[6]Both the *Owens* and *Tucker* cases involved illegal possession of liquor. Cook and Sykes JJ. wished to assimilate this situation to those cases in which evidence concerning objects taken from the person of a lawfully arrested prisoner is admitted. *Cf.* Pringle v. State, 108 Miss. 802, 67 So. 455 (1914). For a complete discussion of all Mississippi cases on search and seizure of intoxicating liquors, see Note (1933) 5 MISS. L. J. 246.

In Mississippi, as well as in the other states following the exclusion theory the evidence is disallowed upon the theory that its admission violates the Constitutional guaranties as set forth in the fourth and fifth amendments.[7] Some of the authorities adhering to this view hold that to allow the admission of evidence so obtained would be similar to allowing confessions obtained by torture. Certainly this is not true. One reason that confessions extorted by torture are excluded arises from doubt of the veracity of such confessions. Any but the strongest willed persons may give the answer desired by the torturer, in order to avoid further pain. This objection does not apply to evidence obtained during illegal search. The fact of illegality can hardly affect the truth of the evidence.[8]

One eminent author, Wigmore, who is opposed to the exclusion theory says, "A judge . . . does not attempt, in the course of a specific litigation to investigate and punish all offenses which incidentally cross the path of said litigation. The rule of exclusion offends, in the first place, by trying a violation of law without that due complaint and process which are indispensable for its correct investigation. It offends, in the second place by interrupting, delaying, and confusing the investigation in hand, for the sake of a matter which is not a part of it. The judicial rules of evidence were never meant to be an indirect process of punishment. It is anomalous to distort them to that end." He ascribes the action of many of the state courts in following *Boyd v. United States*[9] to a "temporary recrudescence of individualistic sentimentality for freedom of speech and conscience stimulated by the stern, repressive war measures against treason, disloyalty and anarchy in the years of 1917 and 1919."[10]

The theory of our criminal proceedings, like that of Great Britain is accusatory, not inquisitorial, and constitutional guaranties against being forced to give incriminating testimony must have a broad construction in favor of the rights which they were intended to secure. Conversely, they should not be used as a guise to protect a criminal whom it was never intended they should favor but who does receive protection behind them because of the nature of the evidence sought to be used against him.

This appears to be the situation: Mississippi, by virtue of the *Tucker* case, follows the minority rule in this sort of situation. While the facts of the instant case clearly place it as an exception to the illegally obtained evidence rule, the opinion is at least some indication that the Mississippi Supreme Court is on the way to a return to the majority rule. It would be an aid in furthering the ends of law and justice to abrogate the old rule and thus allow the courts to admit such evidence. This would obviate the necessity of allowing criminals to go free and the legislature would have the duty of enacting a statute providing against the so called "fishing expeditions" of officers.

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[7]U. S. CONST. Amend. Art. IV, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, . . ." U. S. CONST. Amend. Art. V, ". . . nor shall be compelled in any Criminal Case to be a witnes against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

[8]Hutton, *A Special Privilege to the Criminal—His Immunity Under the Rule Suppressing Proof of Crime Obtained by an Officer Trespassing on Premises in Possession of the Criminal* (1936) 8 MISS. L. J. 248.

[9]116 U. S. 616 (1886).

[10]4 WIGMORE, EVIDENCE (2d ed. 1923) § 2183.

The danger inherent in police searches is minimized by the fact that Mississippi, because of its small population, does not need the great amount of protection from these police searches that larger cities in other sections require. Many of the officers of our state are personally acquainted with the people, which fact simplifies our need for this sort of protection.

William H. Fedric

TRUSTS—RESULTING TRUSTS—PURCHASE BY WIFE IN NAME OF HUSBAND—APPLICATION OF STATUTE REQUIRING "TRANSFER OR CONVEYANCE" BETWEEN HUSBAND AND WIFE TO BE IN WRITING AND RECORDED.

Plaintiff proposed to purchase land making part payment in cash and giving notes and deed of trust for deferred payments. Being advised that any record indebtedness would unfavorably affect her mercantile credit, she took title in her husband's name, making the down payment of $500 herself. The notes were executed by the husband and later paid by the wife pursuant to an understanding at the time of the conveyance. The land became the homestead of the parties. Defendant, judgment creditor of the husband, levied execution on the land. Plaintiff sued to enjoin the sale. The lower court held for the plaintiff on the theory that the husband was merely a trustee for the wife. HELD: Judgment reversed. Because of Section 1944, MISS. CODE ANN. (1930),[1] requiring any "transfer or conveyance" between husband and wife to be in writing, acknowledged and filed for record to have validity against third persons, and Section 3348[2] prohibiting oral declarations of trust, there can be no trust in favor of the wife. *Dogan v. Cooley*, 185 So. 783 (Miss. 1938).[3]

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[1]"A transfer or conveyance of goods and chattels, or lands, or any lease of lands, between husband and wife, shall not be valid as against any third person, unless the transfer or conveyance be in writing and acknowledged and filed for record as a mortgage or deed of trust is required to be; and possession of the property shall not be equivalent to filing the writing for record, but, to affect third persons, the writing must be filed for record."

For similar enactments see ILL. REV. STAT. ANN. (Smith-Hurd, 1935) c. 68, § 9; KY. STAT. ANN. (Carroll, 1930) c. 66, § 2128. The matter is considered in 3 VERNIER, AMERICAN FAMILY LAWS (1935) § 182.

[2]"Hereafter all declarations or creations of trusts or confidence of or in any land shall be made and manifested by writing, . . . but where any trust shall arise or result, by implication of law, out of a conveyance of land, such trust or confidence shall be of the like force and effect the same as it would have been if this statute had not been passed."

[3]In regard to the trust feature of the case it is not wholly clear whether the holding is: (1) that § 1944 prevents a resulting trust between husband and wife, the statements as to § 3348 being merely in the nature of a makeweight; or (2) that § 1944 prevents there being a valid express trust and that the saving clause in § 3348 does not operate because the payments were subsequent. The indication is that the court regards § 1944 as defeating a resulting trust between husband and wife, particularly so in view of the fact that § 3348 alone would defeat an express trust irrespective of the husband and wife statute.

Justice Griffith concurred in result, but preferred to place his decision on the ground that the wife was not entitled to invoke the aid of a court of equity because her purpose in having the land transferred to her husband was to deceive her creditors.

When one person pays the purchase price for land and the conveyance is made to another, a resulting trust normally arises in favor of the payor of the consideration. The courts have followed the view that such circumstances give rise to a presumption that the payor intended to receive the beneficial interest in the property. Accordingly, the trust imposed is called "resulting", since it arises or "results" from circumstances indicating an intention, actual, presumed, or fictitious, to create a trust.[4] Such trusts are distinguished from "constructive" trusts which are primarily "fraud-rectifying", and are imposed to prevent unjust enrichment. Constructive trusts are considered to differ from resulting trusts in that they are enforced irrespective of any "intent" of the parties.[5]

Trusts which "arise or result, by implication of law" are expressly excepted from the operation of the Statute of Frauds.[6] Even without such a provision the statute would doubtless have been construed to except such trusts.[7] From the nature of such interests, a requirement that they be in writing would have effected their abolition.[8] Consequently, this exception has been construed to cover both resulting and constructive trusts,—to which fact their importance is largely attributable.

Further recognition of the unrecordable nature of resulting trusts is revealed in certain Mississippi decisions involving the application of recording statutes.[9] The court has said that neither the spirit, object nor language of the

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Justice McGehee was inclined to favor the resulting trust but concurred in the reversal in order that a fuller development of the facts in regard to the homestead aspect of the case might be had. A considerable portion of both the controlling and dissenting opinions is devoted to the discussion of the homestead question and the overruling of Clark v. Edwards, 180 Miss. 97, 177 So. 361 (1937).

Chief Justice Smith, Justice McGowen concurring, wrote a vigorous dissent holding that the statute had no application to resulting trusts and that the fact that the payments were subsequent was immaterial if they were made in pursuance of an agreement entered into at the time of the conveyance. As to the matter of subsequent payments, see 2 BOGERT, TRUSTS AND TRUSTEES (1935) § 456; 3 SCOTT, THE LAW OF TRUSTS (1939) § 456.2; 2 RESTATEMENT TRUSTS (1935) § 456.

[4]Harvey v. Ledbetter, 48 Miss. 95 (1873); 2 BOGERT, TRUSTS § 454; 3 SCOTT, TRUSTS § 440; 2 RESTATEMENT, TRUSTS § 440.

[5]2 BOGERT, TRUSTS § 451; 3 SCOTT, TRUSTS § 406; 2 RESTATEMENT, TRUSTS § 440.

[6]MISS. CODE ANN. (1930) § 3348, *supra* note 2; 2 BOGERT, TRUSTS § 452; 3 SCOTT, TRUSTS § 406; 2 RESTATEMENT, TRUSTS § 406.

[7]2 SCOTT, TRUSTS § 406.

[8]This exception has its origin in the original Statute of Frauds, 1677, 29 Charles II, c. 3 §§ 7, 8. 2 BOGERT, TRUSTS § 452: "The court had held that these resulting uses and trusts should come into being as a result of certain conveyancing situations, where there was no direct expression of the parties concerning a use or a trust. Obviously to have subjected these law-inferred or law-created trusts to the Statute of Frauds and to have required them to be manifested or proved by a writing would have been inconsistent with the theory of such resulting trusts. Since they were at that date in large part trusts arising out of situations where there was no express statement of an intent to have a trust, either oral or in writing, to have required a written statement of such intent would have legislated resulting trusts out of existence." Nor does the fact that there is an oral agreement identical with that which the law would have implied change the character of the trust. 2 BOGERT, TRUSTS § 461; 3 SCOTT, TRUSTS § 441.2.

[9]MISS. CODE ANN. (1930) §§ 2146, 2147; Kelly v. Mills, 41 Miss. 267 (1861); Miss. Valley Co. v. Chicago, St. Louis & N. O. R. R., 58 Miss. 846 (1881); Perry

registry acts contemplates resulting trusts.[10] Equities which arise by operation of law and are not susceptible of recordation are not included within such statutes.[11] To require such trusts to be in writing and recorded is manifestly inconsistent with their essential theory and nature. The reasoning which prompts the exclusion of these interests from the Statute of Frauds and recording acts seems equally applicable to cases where Section 1944 is sought to be invoked. In view of the legislative attitude evinced in similar statutes, the imposition of such a requirement in the absence of a clear statutory direction may well be questioned.

The only material respect in which Section 1944 differs from the recording statutes is in the appearance of the word "transfer" in the former. On occasion the term has been given a broad definition,[12] and it might perhaps be extended to include any change of title by *operation of law*.[13] But to adopt this interpretation would extend the statute to include constructive trusts which the court very properly suggested it would decline to do.[14]

Indeed, whether in any sense there has been a shifting of title or any aspect of ownership from the *husband* to the wife is debatable. It is quite possible to conclude that the beneficial interest in the land never vested in the husband, even as a conduit of title, but passed directly to the wife by virtue of her payment of the purchase money.[15] Never having acquired any

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Nugent Co. v. Priebatsch, 61 Miss. 402 (1883); Cannon v. Holberg Mercantile Co., 108 Miss. 102, 66 So. 400 (1914).

[10]Kelly v. Mills, 41 Miss. 267, 282 (1861).

[11]Miss. Valley Co. v. Chicago, St. Louis & N. O. R. R., 58 Miss. 846, 854 (1881). But see Nugent Co. v. Priebatsch, 61 Miss. 402 (1883) where the recording statutes were held to destroy the right of reformation where the rights of a judgment creditor had intervened. For a criticism of this case seen Malone and Keesee, *The Reformation of Writings Under the Law of Mississippi* (1936) 8 MISS. L. J. 329, 339.

[12]See examples cited in 63 C. J. § 777.

[13]See CAL. CIV. CODE (Deering, 1937) § 1039 "Transfer is an act of the parties or of the law, by which the title to property is conveyed from one living person to another." *But cf.* Baker v. Fifth Ave. Bank of N. Y., 223 App. Div. 238, 232 N. Y. Supp. 238 (1st Dep't 1928), where revocation of a trust by the settlor with the consent of the beneficiary was held not a "transfer" of the beneficiary's interest.

[14]185 So. 783, 788: "Of course, the trust results, in spite of the statute, if one person takes money belonging to another, and converts it to his own use by investing in property in his own name." Although the trust is said to "result", it would more properly be termed a constructive trust. In this connection it is interesting to note that MISS. REV. CODE (1857) c. 40, § 5, Art. 24 provided ". . . And if the husband shall purchase property in his own name with the money of the wife, he shall hold the same only as trustee for her use. . . ." In Gibson v. Foote, 40 Miss. 788 (1866) this section was held to apply only where the purchase was without the consent of the wife.

[15]The other explanation, of course, would be that both the legal and equitable titles to the land vest in the husband, and that the equitable title is transmitted to the wife by operation of law. Even then, some significance might be found in authorities holding that where land is disposed of by separate instruments, which constitute together a single transaction and title is vested in a husband as a conduit of title, he has no beneficial interest to which the wife's right of dower can attach. 1 TIFFANY, REAL PROPERTY (2d ed. 1920) § 211; McCauley v. Grimes, 2 Gill & J. 318, 20 Am. Dec. 434 (Md. 1830).

beneficial interest the husband would have transferred none. The transfer, if any, would seem to be between the original grantor and the wife.[16]

This reasoning may give additional significance to two cases involving the application of Section 1944 to purchases of personalty.[17] In each the court held that payment of the wife's money vested ownership in her even though the husband apparently purchased for himself.[18] While the court based the decisions solely on the evidence as to who paid for the property, and not on any theory of resulting trusts, it is settled that such trusts may be enforced in regard to personalty.[19] There is, of course, the possibility that in regard to realty a different result might be desirable.[20] The establishment of resulting trusts in land usually involves the overthrowing of formal documents of record and tends to make for uncertainty in the title to land. In addition, the opportunity for fraud on creditors is immeasurably increased.[21] However, these considerations would seem applicable with equal force to resulting trusts between all parties, and not merely to those involving husband and wife.

Obviously the purpose of Section 1944 was to diminish the opportunity for transactions between husband and wife in fraud of creditors. The nature of the relationship affords unexcelled opportunity for deception. As pointed out in the instant case, the privilege of claiming immunity from the testimony of the other spouse should cause the courts to subject transactions between husband and wife to the closest scrutiny. The inseparable commingling of the in-

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[16]In Underwood v. Ainsworth, 72 Miss. 328, 332, 18 So. 379, 380 (1894), where it was held that a lease was not embraced within the provisions of the statute because it involved no change of ownership (the statute was later amended to include leases by Miss. Laws 1900, c. 90.), the court said: "Its purpose is to invalidate transfers and conveyances between husband and wife of property which is claimed by creditors or others to be that of the spouse, who, but for the transfer or conveyance, would be the owner." It is submitted that there is no transfer between the husband and wife which divested him of any estate, and "but for which" he would have been the owner.

[17]Fox v. Tyrone, 104 Miss. 44, 61 So. 5 (1913); Dorsett v. Breithaupt, 133 Miss. 457, 97 So. 756 (1923).

[18]In Fox v. Tyrone, 104 Miss. 44, 61 So. 5 (1913), the husband purchased a piano with money belonging to the wife. The husband ordered the piano, signed the notes for deferred payments, and had the receipts made out in his name. The court held that the wife "purchased and paid for the property and it is hers." In Dorsett v. Breithaupt, 133 Miss. 457, 97 So. 756 (1923), the wife advanced money to the husband and directed him to purchase a car for her, requesting that he sign her notes as indorser. The husband in fact gave his own note, which the wife later paid. The car was assessed to the husband on the county rolls and the license issued in his name each year, the money therefor being paid by the wife. It was held that the wife was entitled to the car as against a judgment creditor of the husband.

[19]2 BOGERT, TRUSTS § 454 n. 34; 3 SCOTT, TRUSTS § 440.

[20]N. Y. CONSOL. LAWS (Cahill, 1930) c. 51 § 94 abolishing purchase money resulting trusts does not include personalty. *In re* Finkelstein, 33 F. (2d) 278 (C. C. A. 2d 1929). In connection with Dorsett v. Breithaupt, 133 Miss. 457, 97 So. 756 (1923) cited *supra* note 17, compare the provisions of MISS. CODE ANN. (1930) §§ 5589, 5590 requiring a memorandum of the sale of automobiles and permitting the recordation of such memorandum.

[21]2 BOGERT, TRUSTS § 464 discusses both of these factors. In Kentucky, Michigan, Minnesota, New York, and Wisconsin purchase-money resulting trusts have been abolished by statute. Statutes in Indiana and Kansas, while not abolishing these trusts, place the burden of proof as to intention upon the person seeking to enforce the trust.

terests of each in the possessions of the other adds incentive to opportunity. Presumably the statute was designed to be twofold in its operation: (1) to give notice to creditors that one party was conveying to the other, and (2) to protect creditors who relied on the apparent ownership of property.[22] In the instant case, had the trust been enforced, it would have sanctioned the deceiving of the creditors of both husband and wife—the former as to the extent of the husband's ownership of property, and the latter as to the state of the wife's indebtedness.[23]

The decision in the end, therefore, may amount to a construction of the statute in the light of the policy which caused its adoption. But it should be recognized that to apply the statute in this case is not simply to require resulting trusts, as between husband and wife, to be in writing, but actually to bring about their complete abolition. A result so far-reaching in effect may well occasion a pause for reflection.

George H. Butler, Jr.

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[22]In Montgomery v. Scott, 61 Miss. 409, 410 (1883), the court said of § 1178, MISS. REV. CODE (Campbell, 1880), which substantially corresponds to the present section, that the object "was to prevent the introduction of parol proof to establish either the existence of a contract of sale between husband and wife, or the fact that other persons had notice of such sales or transfers. A sale or transfer not made in the manner prescribed and recorded as is provided by said section is invalid. Nothing can be substituted as equivalent to the thing required by the statute to be done."

[23]Justice Griffith preferred to base his decision on the wife's want of equity since she had resorted to the plan to mislead her creditors. In Snider v. Udell Woodenware Co., 74 Miss. 353, 20 So. 836 (1896), a similar principle was applied where a wife sought to enforce a resulting trust, the court apparently declined to extend the statute, but denied relief on the ground that the petitioner was guilty of fraudulent conduct under the particular facts. A like result has been reached where the payor has an illegal purpose in paying the consideration for title taken in the name of another. 3 SCOTT, TRUSTS § 444.

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